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Nos. 8587 and 8588.

IN THE

SUPREME COURT,

—OF THE—

State of California.

CHARLES LUX et al.,

Appellants,

vs.

JAMES B. HAGGIN et al.,

Respondents.

Brief for Appellants in Reply.

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Of Counsel.

Filed February 8 1884.

J. W. McCarthy *Clerk.*

By J. J. Williams *Deputy Clerk.*

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APPELLANTS' BRIEF IN REPLY.

Counsel for defendant, at the beginning of their brief last filed, state that they have incorporated into such brief those portions of their points and authorities on which they particularly rely, and thus save your Honors the trouble of considering both; and then add: "We therefore ask leave to substitute this "brief for the points and authorities, *in which we find,* "*owing to the haste with which they were prepared, many* "*clerical errors.*"

We shall therefore, in this brief, follow defendants' course in the order in which we present the points we rely upon, in so far as they have in their brief referred to the findings and rulings of the Court below.

In this brief, we shall in all cases, when we give the

testimony of a witness, carry into the margin the folio that appears in the transcript, the printer having had placed in his hands a copy of such transcript for the purpose of setting up such matter. We do this that whatever may appear in this brief in the way of testimony, will be a perfect transcript of the record in this case, *line for line.*

On the argument in this case, one of counsel for defendants, whose close relationship to the real defendant in this case, seems to have made him over zealous, indulged in a few remarks called forth, he stated, from finding on one or two of the pages in our first brief filed, an error in the testimony as given by us of some witness. Still, after this display of virtuous indignation, we find defendants' counsel compelled to abandon their brief, first filed, on account of the "*many clerical errors*" contained in it. To avoid any possible chance for a repetition of any such criticism upon this brief, we have adopted the course above indicated in its preparation.

We shall in this brief, have occasion to call attention to numerous instances where counsel in their last brief have misquoted the testimony of witnesses, although the evidence is carried into such brief with quotation marks; and that said brief, in so far as it assumes togive the testimony of witnesses who testified in this case, is frequently incorrect and unreliable.

The following are fair samples of the correctness of their quotations (?):

On page 28 of their brief they pretend to give the testimony of J. C. Crocker in support of the second finding, to the effect that plaintiffs proved no possession of any of the land in the amended complaint described, prior to the dates of the patents and decree

in *People* v. *Center*, 1876, and later, and to show that plaintiffs failed to show possession prior to such date.

The testimony as printed in their brief (p. 28)' with quotation marks, is as follows:

"I have been on the slough from that time to the
" present time. I was continually working after that
" time, off and on. In former years we generally
" ranged our cattle from Buena Vista Lake to Tulare
" Lake; some scattering cattle were further north and
" further south than that. That was where we calcu-
" lated to keep those cattle—within those bounds.
" (T., II, fols. 488–9.)"

Let us then turn to T. II, fols. 488–9, and see what Mr. Crocker did say:

" I have been on the slough from that time up to the
" present time. *I probably got back the same month.* I
489 " was continually working afier that time off and on. *I*
" *have been there more or less, the most of my time since,*
" *every year. I have been raising cattle, and engaged in*
" *the stock business.*
" Q—*Between what points have you ranged your cattle*
" *on that slough since* 1879?
" A—Well, we have generally ranged them between the
" —in former years, from the Buena Vista Lake, they
" ran to Tulare Lake; and some scattering cattle even
" further north and further south than that. That was
" where we calculated to keep those cattle—within
" those bounds."

T., II, fols. 488–9.

On this question of possession, defendants' counsel attempt to show by plaintiffs' own witnesses, that they had no possession prior to 1876, and they leave out portions of the testimony, and that too, when the witness says:

" *I have been there more or less the most of my time*
" *since* (referring to 1869), *every year. I have been rais-*
" *ing cattle and engaged in the stock business.*"

Continuing in their brief (p. 28) and assuming to give the testimony of Mr. Crocker, they again place in quotation marks the following:

"In working in that swamp with our cattle from the "year 1869 to the year 1876, we were all through the "swamp. In handling our cattle there, we would cross "from one side to the other. T., II, fol. 494."

Turning to folio 494, we find the testimony of Mr. Crocker reads quite differently.

It reads:

"Q—In working in that swamp, as you style it, Mr. "Crocker, with your cattle, from the year 1869 to the "year 1876, were you all through that swamp and cross-"ing the channels?
"A—Yes, sir; I think *I have been on every acre "in that swamp, from one end of it to the other at dif-"ferent stages of water. At high water, of course, I was "not in so frequently.*
"Q—In handling your cattle there, would you cross "it from one side to the other?"
"A. Yes, sir."

T., II, fol. 494.

Why is this change made, changing question to answer and leaving out the statement of Mr. Crocker that he had been on every acre of land in that swamp, from one end to the other at different stages of the water? The only purpose can be to eliminate the fact that Mr. Crocker testified to facts in relation to his possession of the land in suit that must compel this Court to declare the second finding contrary to the evidence.

On the trial, they succeeded in getting the Judge of the Superior Court to strike out the testimony of Mr. Crocker, when he said he went into the possession of the land when he purchased it in 1870.

T., III, fols. 129–135.

No doubt had they, in the lower court, moved to have all of Crocker's testimony relating to the possession of this land stricken out, the motion would have

been granted, but failing to have made such motion, they cannot get rid of its effect by misstatements and misquotations.

Again, on the same question of possession, they pretend to give the testimony of Mr. Murray, the only witness called by them who ever had cattle on Buena Vista Slough. They give his testimony, and again in quotation marks, as follows: (Pages 37–8.)

"The first time I knew Mr. Crocker having any
" cattle in this country was in 1869 or 1870. I met his
" men through there, and I knew his cattle; they were
" working all through the country here. Crocker had
" cattle all over the country. I have seen his men all
" over Tulare County, going up to Port Tejon and Santa
" Maria, attending all the rodeos, Linn's Valley, Poso
" Creek, up Kern River, on Tule River, and north of
" Tule River. (Fols. 1502–3."

Whereas, he did testify as follows:

"The first time I knew Mr. Crocker having
" any cattle in this country, say in 1869 or 1870, I met his
" men through here, and I knew his cattle. They were
" working *down there in the swamp branding, on the west*
" *side and all the way through the whole country here.*
" *There were cattle in every place. I saw then, I think, the*
" *first year—the first year I met Crocker's men, I think it*
" *was on the east side of the swamp, down below Goose*
1503 " *Lake, between there and what is called the Tule House.*
" Mr. Crocker had cattle all over the country. I don't know
" that I saw them that particular season. I have seen his
" men all over Tulare County going up to Fort Tejon and
" Santa Maria, attending all the rodeos—Linn's Valley,
" Poso Creek, up Kern River—on Tule River and north
" of Tule River."

T., IV., fol. 1502–3.

The portion in italics is left out.

Why did they leave out the portion of the testimony where Murray says Crocker was working and had cattle on their swamp land in 1869 or 1870?

They continue claiming to quote from the testimony of Mr. Murray: (Page 38.)

"During the years 1869, '70 and '71 there were prob-
" ably 40,000 or 50,000 cattle there or more. Pat
" Murphy had cattle there; Mr. Jones, I think; Crocker
" had cattle there, and Miller & Lux, and Cox & Clarke,
" and Lynch & Fowler, and Blackenship, Bacon, and
" one or two or three of his boys. In 1870 I could
" have sold my cattle there for 2500 cattle. I was
" there also in 1871; worked all through there in the
" fall, spring and summer. Fol. 1505."

Whereas Murray did testify:

"I
" think during the years 1869, '70 and '71 there were prob-
1505 " ably 40,000 or 50,000 cattle there, or more. Pat. Mur-
" phy had cattle there; Mr. Jones, I think; Crocker had
" cattle there; and Miller, and Cox and Clarke. *I mean*
" *Henry Miller*, or Lux & Miller, and Lynch and Fowler,
" and Blackenship, Bacon, and one or two or three of his
" boys. *I don't know exactly how many I had there; I*
" *never counted them.* In 1870 I think I could have sold
" my cattle for 2500 cattle. They were probably worth
" $10 a head. That would make $25,000. I was there
" also 1871. *That was a dry year.* I worked all through
" there with my cattle in the fall, spring and summer."

T., IV, fols. 1504–5.

The foregoing are samples taken from the evidence given in support of a single finding and from the first pages of the brief. To follow defendants' counsel and point out all such misstatements of the testimony would require too much space. We will only call attention to one other instance where a fair statement of the testimony is not given, but another mode is adopted to show to this Court that a finding has some evidence to support it.

They claim that the finding, that there is not a continuous slough through the body of swamp and overflowed land to Tulare Lake, but that it terminates at

Section 24, T. 29 S., R. 23 E., and even before it reaches that point it has breaks in it, and is in places shallow, and not well defined, is supported by the evidence.

Counsel first refer to the testimony of some of plaintiffs' witnesses, and they say:

"Though we deem that the testimony above cited "clearly establishes that there is no continuous channel "within the swamp, still to remove all possible doubt " thereon, we will now refer to the testimony of several " of defendants' witnesses." (Brief, p. 142.)

After referring to the testimony of several of defendants' witnesses, they take up the testimony given by the surveyor, Macmurdo, who made a meander survey of Buena Vista Slough to Section 24, T. 29 S., R. 23 E., who made from such survey the maps "H" and "I," introduced in evidence by defendant, upon both of which this slough or channel appear as continuous, and with no breaks, and who testified that Buena Vista Slough is correctly laid down on those maps, and that he had repeatedly followed this channel from Wible's Headquarters to the Bonestell House; they attempt to show that this witness testified that Buena Vista Slogh, at certain points in the first section of plaintiffs' land reached by Buena Vista Slough, and in the section north of it, Section 15, in which appears a break on Exhibit "A," annexed to and made a part of the findings, was shallow, not well defined, and in fact had no banks.

How do they do it? The process is,—and it is one adopted in their brief from one end to the other,—to give one-half of the testimony or less that appears on a folio, and then passing to the next, or to give a question and but a portion of answer to such question.

We give below all the testimony given by this wit-

ness on his direct examination as to the condition of Buena Vista Slough where it ran through Section 10, T. 30 S., R. 24 E., the most southerly section of land described in the amended complaint and Section 15, the first section south of that section, and we italicize the portion left out of defendants' counsel's brief.

See pp. 153–4 of their brief.

"Q—After crossing the levee and going northward,
" will you describe this slough?
" A—This slough continues on pretty much the same
" character of slough. It is very crooked; gouged out in
" deep holes on the bottom, has perpendicular banks in
" places; continues on in that way probably a mile to
" the northwest; it continues that way to Section 15, un-
" til it reaches the north line of Section 15.
" Q—Continues how?
" A—Continues to run very crooked, and it has very
1068 " deep holes along there, and has well-defined banks
" until it reaches very nearly the north line of Section
" 15, T. 30, R. 24. There are ponds on the outside of
" the channel, and the water of the slough goes up in
" this pond there and into Section 15, between the chan-
" nel and the bank of the canal.
" Q—You say that it has defined banks. How are the
" banks as to height above the bed of the slough?
" A—It is hard to tell where the bed of the slough is
" there. *There are deep holes in it. In some places*
" *they are* 10 *feet, I suppose, above the bottom of the*
1069 " *slough.*
" Q—*These deep holes?*
" A—*That is, the deep holes. The water;—take an*
" *ordinary small heap of water, and run it through there*
" *and it will be probably* 4 *feet above the surface of the*
" *water.*
" Q—*That is, the lowest bank in there would hold* 4
" *feet of water in Section* 15?
" A—*I don't know. There are probably lower places*
" *than that.*
" Q—*There are places where four feet of water would not*
" *be contained in the banks?*
" A—*I think so.*
1070 " Q—From the north line of Section 15, describe the
" slough through the next section, that is, Section 10, T.
" 30, R. 24.

" A—The slough part of the way, has good banks in
" there, and it is very crooked, and the current is very
" sluggish, very slow. It has very little fall, and it has
" very low ground on both sides. There are places where
" the bank is very low, almost as low as the bed of the
" stream in places. On the east side of the slough the
" bank, as a general thing," is higher than on the west
" side.
1071 " Q—The bank is as low as the bed of the slough
" itself.
" A—Yes, sir.
" Q—*What depth of water will that portion of the*
" *slough carry, without getting out of the banks through*
" *Section* 10.
" A—*I hardly know how much it would carry; in some*
" *places it has deep holes in there. Through the greater*
" *part of* 10, *it would carry probably, as much water as*
" *in* 15, *until it got pretty well up into Section* 10. *Then*
" *the banks are lower, and it would carry very little*
1072 " *water;* 2 *or* 3 *feet of water above the general bottom of*
" *the slough.*
" Q—*You think it would carry two or three feet at every*
" *point through without overflowing the banks at all*
" *through* 10 *?*
" A—*No, sir; up to a good way in* 10. *I say, I don't*
" *know how far exactly; pretty well up into* 10. *The bank*
" *on the east side is a good bank.* On the west side it is
" low, and it has a levee along that bank to keep the
" water from flowing out.
" Q—*Then, in your description of the amount of water,*
" *have you taken into account the levee that is used ?*
1073 " A—*No, sir;* through the balance of Section 10 the
" banks get lower, and continue to get lower until it gets
" up into Section 3."

T., IV, fols. 1067–1073.

This is a witness of defendant, and it will be seen one who takes kindly to suggestions from counsel.

He says this slough continues the same as the slough south of the levee, very crooked, with perpendicular banks in places *to the north line of Section* 15; has well-defined banks until it reaches very nearly the north line of Section 15. He is then asked the question:

" Q—You say it has defined banks. How are the
" banks as to height above the bed of the slough?"

The answer given by defendant's counsel in their brief is:

"A—It is hard to tell where the bed of the slough
" is there."

Why do they cut the answer in two? He goes on and says:

" *Take an*
" *ordinary small head of water and run it through there*
" *and it will be probably 4 feet above the surface of the*
" *water.*"

This answer not being satisfactory to counsel, the witness is asked the question:

"Q—That is, the lowest bank in there would hold 4
" feet of water in Section 15?
" A—*I don't know. There are probably lower places*
" *than that.*"

The suggestion then came from counsel:

"Q—There are places where 4 feet of water
" would not be contained in the banks?
" A—*I think so.*"

It is all a matter of guess work with him. He testified on cross-examination that he did not cross the slough between the levee and the Norton House. He did cross it at the Norton House, and that is the point where defendants claim it was least well-defined, and he is asked:

"Q—How deep was the water at that point?
" A—*The water was—I don't exactly remember. They*
" *measured it. I did not measure it myself and don't*
" *remember. It was about five or six feet deep.*
" Q—How wide was it at that point?
1276 " A—I did not measure it; probably 50 feet."

T., IV, fol. 1275-6.

Still, he *thinks* there may be places where the channel may not carry four feet of water.

His thoughts are not justified by the information

obtained by him on his meander survey, nor by that obtained on the trips along the slough in company with Mr. Cruso, nor by his maps "H" and "I."

Again, testifying as to the channel through Section 10, the next section north, he says:

"The slough a part of the way has good banks in there, etc. * * * There are places where the bank is very low, *almost* as low as the bed of the stream in places."

Then came the leading question again. It is not enough that the witness says it is *almost* as low as the bed of the slough:

"Q—The bank *is as low* as the bed of the slough
" itself?
" A—Yes, sir."

At this point in Macmurdo's testimony counsel leave out of their brief the the very full description of the slough through Section 10, given by this witness, as they did the description of it through Section 15, and it will be borne in mind that this is a witness of defendant and his direct examination.

"Q—*What depth of water will that portion of the*
" *slough carry, without getting out banks, through*
" *Section* 10?
" A—I hardly know how much it would carry; in some
" places it has deep holes in there. *Through the greater*
" *part of* 10 *it would carry probably as much water as*
" *in* 15, *until it got pretty well up into Section* 10. *Then*
" *the banks are lower, and it would carry very little*
" *water;* 2 *or* 3 *feet of water above the general bottom of*
1072 " *the slough.*
" Q—You think it would carry 2 or 3 feet at every
" o int through without overflowing the banks at all
" through 10?
" A—No, sir; up to a good way in 10, I say, I don't
" know how far exactly; pretty well up into 10. The bank
" on the east side is a good bank."

T., IV, fols. 1071–2.

In both cases they leave out the only testimony of this witness from which your Honors can gain any definite idea of the size of the channel through Sections 15 and 10. Through Section 15 he says it will carry 4 feet of water, but *thinks* there may be places where it might not carry so much. Through Section 10 it will carry about the same up to pretty well in the section, and then, where the banks are lower, 2 or 3 feet.

Then again he is prompted by counsel:

"Q—You think it would carry 2 or 3 feet at every
" point through without overflowing the banks at all
" through 10?
" A—No, sir; up to a good way in 10. I say I don't
" know how far exactly; pretty well up into 10. The bank
" on the east side is a good bank. On the west side it is
" low, and it has a levee along that bank to keep the
" water from flowing out."

T., IV, fol. 1072.

Counsel only insert the last portion of this last answer in their brief (p. 153), i. e.: "On the west side " it is low, and it has a levee along that bank to keep " the water from flowing out." But they omit the next question and a portion of the answer to it:

"Q—*Then in your description of the amount of water*
" *have you taken into account the levee that is used?*
" A—*No, sir.*"

Thus making a clear misstatement of the testimony; first, by leaving out the testimony of this witness that the channel through Section 10 will carry 4 feet of water (as much as Section 15) through the most of the section, and from 2 to 3 feet the balance of the way, where it is not so deep, and second making the witness testify that an artificial levee forms the west bank of the channel, when he says he did not take this levee into account when he was describing the amount of water that would run in the slough.

We cannot devote further space to pointing out the numerous instances of just such quotations (?) of testimony contained in defendants' carefully prepared brief. The references we have made, are, we think, sufficient to show the mode adopted by counsel to sustain the Court in making certain findings which we attack as not supported by the evidence, and which, we claim, are contrary thereto. We shall now review the testimony, and we think we can show to this Court that in making many of the findings, the lower Court was in no manner governed by the evidence given in the case.

The Findings are not Justified by the Evidence.

When an appellant attacks the findings of a lower Court on the ground that they are not justified or sustained by the evidence, we understand the rule to be that he must show clearly that the findings attacked are against the weight of evidence.

That if there be a *substantial conflict* in the evidence, this Court will not disturb an order denying a motion for a new trial.

Wetherby v. *Thomas*, 55 Cal., 11;
Livermore v. *Stine*, 43 " 277.

The rule in this Court is, and always has been, that there must be a *substantial* conflict in the evidence to preclude this Court from reversing an order denying a motion for a new trial, when findings are attacked as not being supported by the evidence.

Clark v. *His Creditors*, 57 Cal., 639;
Downey v. *Hellman*, 58 " 63;
Fresno, etc., v. *McCarthy*, 59 Cal., 309;
Stockman v. *Riverside, etc.*, XI P. C. L. J., p. 638;
Thiele v. *Koster*, XI P. C. L. J., 110.

If the conflict is "direct and certain," the order will not be reversed.

Price v. *Sturgis*, 44 Cal., 597.

It has never been the rule in California that the Supreme Court would not review the findings when they were manifestly against the weight of evidence.

Orders of District Courts denying motions for new trial have been repeatedly reversed and a new trial granted by the Supreme Court, where there was some evidence tending to support the findings, on the ground that the findings were not supported by the evidence.

In *Branson* v. *Caruthers*, 49 Cal., 381, a finding was attacked on the ground that it was not justified by the evidence. The point was held to be well taken.

Three witnesses testified to the agency of Branson in a certain matter. Branson denied explicitly the agency. His credibility was weakened by his swearing to other facts denied by others. Judgment went for plaintiff, Branson, and new trial denied. The Supreme Court say:

"The findings of the Court below cannot be upheld here under the rule in respect to findings where there is a substantial conflict in evidence." P. 382. The Supreme Court reversed the order denying the motion for a new trial.

In *Carpentier* v. *Gardner*, 29 Cal., 161, findings were attacked as not warranted by the evidence. Four witnesses testified to the rental value of certain premises for defendant. Only one testified for plaintiff. The finding was in accordance with the evidence of plaintiff's single witness. The Court say:

"In this case the evidence was overwhelmingly against the finding, and there is not such a conflict as

to bring it within the rule heretofore adopted by this Court." P. 164.

In *Franklin* v. *Dorland*, 28 Cal., 175, five unimpeached witnesses stood opposed to a description in a deed. The finding was in accordance with the description contained in the deed. The District Court denied a motion for a new trial. Held, the finding was so far opposed to the evidence as to justify the awarding of a new trial, and the Supreme Court reversed the order of the District Court, and awarded a new trial.

In *Guerrero* v. *Ballerino*, 48 Cal., 118, one witness swore positively to facts that were established by the finding, but the order denying a new trial was reversed.

In *Johnson* v. *Scribner*, 6 Conn., 185, three witnesses for plaintiff, in an action for slander, testified explicitly to the speaking of the words charged, in a place where a fracas took place, with much confusion. Eleven witnesses for defendant testified that they were in the room, and heard no such words as plaintiff's witnesses had sworn to, and that, in their opinion, they should have heard them if they had been spoken. Verdict for defendant. The Supreme Court granted a new trial, on the ground that the verdict was clearly against the weight of evidence.

In New Jersey the same rule is adopted, and if a verdict be plainly against evidence, or, if in a case of great consequence, when some doubt might exist as to the correctness of the conclusion drawn by the Court or jury, it would seem right that the case should be more deliberately argued and submitted, it is certainly most consistent with the objects of justice to afford such an opportunity.

Hutchinson v Coleman 5 Halst., 74;
Kohne v. *The Ins. Co. of North America*, 1 Wash., C. C., 123.

And see

Bayley v. *Eaton*, 8 Cal., 164.

If any other rule were adopted, and a new trial denied, no matter how slight the evidence was on one side, and how strong and conclusive on the other, on the ground that there was some evidence tending to support the finding, the Court would be restrained from interfering, notwithstanding the findings might be manifestly against the weight of evidence.

If such a rule were adopted, litigants would be sure to accommodate themselves to it, and introduce mere formal evidence when better could not be had, and thus in every case defeat a motion for new trial.

This Court has repeatedly held that the Judge of the trial Court, should grant a new trial, in case the findings are against the weight of evidence, although there might be a conflict in the evidence, and the fact that there was a change in the incumbency of the bench intermediate the trial, and the determination of the motion for a new trial makes no difference in the application of the rule.

In one of the cases in which our Supreme Court held that the fact, that the Judge to whom application is made for a new trial, did not try the case, and therefore the appearance of the witnesses on the stand, their manner in testifying, etc., could not be known to the Judge who is asked to pass upon the motion, the Court say:

"The circumstances that intermediate the trial, "and the determination of the motion for a new trial, "a change in the incumbency of the bench in the "Court below had occurred, and that the motion was "determined by the new incumbent, who had not pre-"sided at the trial, can make no difference in the ap-"plication of the rule. The consideration, *in the*

"*first instance*, of the question as to whether or not "the decision upon a substantially contested issue of "fact is satisfactory to the judicial conscience, is a "~~foundation~~ function of the trial Court as such."

Altschul v. *Doyle*, 48 Cal. 536.

This case has been referred to and approved in a case recently decided in this Court in Bank.

Guttierez v. *Brinkerhoff*, Dec. 28, 1883.

In the case of *Altschul* v. *Doyle*, 48 Cal., 536, the Court say: "*In the first instance*," the question is presented to the Judge presiding in the lower Court, although he may not have tried the case "whether or "not the decision upon a substantially contested issue "of fact is satisfactory to the judicial conscience."

Coming then to this Court, it is then presented to the judicial conscience of your Honors, as to whether or not the decision is satisfactory, and this Court has never established a rule that precludes it from examining the testimony in a case where it is claimed that there is a conflict, to determine whether or not, the lower Court committed error in refusing to grant a motion for a new trial. On the contrary, this Court has, as we have shown, repeatedly reversed orders denying motions for new trial, when applied for on the ground that the findings were not supported by the evidence, and it was claimed by respondent that there was a conflict in the evidence, or some evidence tending to support the findings attacked.

I.

The Second Finding, to the effect that Plaintiff had no "RIGHT, TITLE, INTEREST, CLAIM OR DEMAND * * * LEGAL OR EQUITABLE, to the Land in the Amended Complaint described," is clearly against all the Evidence in this Case.

This will clearly appear by reference to our first brief filed in this case. (See pp. 103 to 106.)

The argument of counsel for respondent in support of this finding is specially aimed at the deed of Baker and others to plaintiffs, dated May 28, 1870, conveying to them 14,000 acres of the land in suit, and counsel claim that this deed conveyed nothing, because it refers to "the official plats of the United States Gov-"ernment Survey," and counsel claim that as the United States Government never sectionizes swamp land, therefore the deed is void for uncertainty, and conveys nothing.

It is true that the Government does not usually run section lines inside of a tract of swamp and overflowed land. That it locates the exterior or "segregation" lines, leaving the State to sectionize the land.

But it is also true that the United States Government recognizes and adopts the State surveys, and is required to do so by Act of Congress.

2 Brightly Dig., p. 104, § 16;
Copp's Land Laws, p. 455.

Certified copies of Government plats are in evidence (plaintiff's exhibits 9, 12, 16 and 19), which show that under the Act of Congress found in 2 Brightly's Digest, that the United States Surveyor General for California did plat the swamp land in sections on the maps of some of the townships referred to in the deed of May 28, 1870.

It is in evidence that the State had sectionized the land described in that deed as early as November 11, 1867, for on that day a patent for 7200 acres of the land included in that deed is patented by the ~~Secre-~~ States ~~tary~~, and fractions of sections to W. F. Montgomery and others.

Trans., Vol. 2, fol. 101–109.

All the maps of defendants' surveyors show the land divided into sections, and all through their testimony they are referring to sections within the swamp land lines.

MACMURDO, testifying to objects within the lines of the body of swamp land, says:

"Q—Whereabouts is Bonestell's House, do you know?"
"A—The house is on the southwest quarter of Section
" 24, T. 29 S., R. 23 E." T., IV, fol. 1087.

" Speaking of the cross-sections made from the north-
" east corner of Section 33, T. 29 S., R. 24 E., he says: "We
" reached water on Section 4, T. 30 S., R. 24 E.
" T., IV, fol. 1114."

" Being asked to locate the Crocker or Norton House,
" he says: "It is on Section 10. I believe it is on 10, or a
" part on Sec. 15, and a part on Sec. 10." T., IV, fol.
" 1153.

" Again: " Weed Island extends down to Section 32."
" T., IV, fol. 1164.

Again, testifying to going down Buena Vista Slough, he says:

"Crossed
" it on Sec. 32, near the Willows." T., IV, fol. 1279.

FILLEBROWN testified:

"I believe Mr. Crocker's house is on Section 15, T. 30, R. 24." T., IV, fol. 243.

He is asked to locate the Willows, and says:

'I cannot locate the Willows positively. I think

" they are located at the sharp bend in the slough, on
" the southeast corner of Section 32." T., IV, fol. 324.

" He locates the "Pond," he finds in making a cross-
" section through Sections 8, 9 and 10, T. 29 S., R. 23 E.,
" somewhere on Section 8. "Probably on the east half."
" T., IV, fol. 376.

All of defendants' witnesses, in testifying to the crossings made by them through the bodvo f swamp land, always give the sections that they passed through in going from one side to the other, and when they come to a point in the middle of the body of swamp land, they find no difficulty in locating it, in relation to sections and townships.

Taylor, James, Schuyler and Jackson all testified to crossing the body of swamp land *diagonally through Sections* 25 *and* 35, *in T.* 28 *S.*, *R.* 22 *E.*, and to finding a slough during the trip. They find no difficulty in finding and starting from the southeast corner of Section 24, T. 28 S., R. 22 E., although that part is at about the center of the body of swamp land, going diagonally through Sections 25 and 35, both in the body of swamp land, and where they found this slough they locate it readily as being about 500 feet from the southwest corner of Section 25.

TAYLOR says:

"Came to the south-
" east corner of Section 24, same township and range;
" after reaching that corner, we went diagonally across
" Sections 25 and 35." T., III, fol. 438.

SCHUYLER says, speaking of this crossing and the slough found in crossing it:

" *That was very near the southwestc orner of the*
" *first section we crossed, Section* 25. * * *
" *We had* 500 *feet yet to go before we came to the corner.*"
" T., IV, fol. 832.

Also testimony of C. G. Jackson, T., IV, fol. 566.

Also testimony of Walter James, T., III, fol. 215.

All of the points referred to by these witnesses are within the main body of the swamp and overflowed land, and nearly all of them in sections conveyed to the plaintiffs by the deed of May 28, 1870, and which the defendants claim is void, because sections are referred to which never existed. It seems that the witnesses of defendant, professional and non-professional, find no difficulty in locating the land in each case by township and section.

Exhibits 9, 12, 16 and 19, Township plats for the following:

Township 31 S., R. 26 E.;
Township 29 S., R. 27 E.;
Township 29 S., R. 24 E.;
Township 28 S., R. 23 E.;

Are all certified copies from the office of the Surveyor General of California. And by an examination of such maps, it will be seen that while the United States Surveyor General does not sectionize swamp and overflowed land, that under the Act of Congress of July 23, 1866, the land in those townships has been sectionized, and on the plats are to be found all sections numbered and the number of acres given in each section. That even the "lots" or irregular fractions in sections are divided, and on each lot the acreage is given. On the margin of Exhibit 19, we find this entry:

"Estimated area of swamp and overflowed lands,
"4680.00 acres.
"From this deduct the area of Buena Vista and
"Tulare Lake.
"Slough not surveyed.
"U. S. Surveyor General's Office.
"San Francisco, California.
"January 15th 1868."

Showing conclusively, that this land had been divided into sections prior to January 15, 1878, and further recognizing the fact that "Buena Vista Slough" ran through the township.

On Exhibit 16, is also found a similar endorsement.

"Estimated area of swamp and overflowed lands,
"4400.00 acres.

"From this area deduct area of Buena Vista
"Slough not surveyed.

"U. S. Surveyor General's Office.

"San Francisco, California.

"January 21st, 1868."

While on Exhibit 9, we find the land not only sectionized, but we also find an entry as follows:

"Tular lands on margin of Lake Buena Vista and
"on the slough connecting it with Kern Lake."

Again showing by an official plat and survey duly certified that the land has been divided into sections, and also showing that Kern and Buena Vista Lakes are separate and distinct bodies of water, connected by a slough, and not one body or sheet of water as found by the Superior Court. (Finding 65.)

All these endorsements were made on these plats in January, 1868, more than two years prior to the date of the deed of Baker and others to the plaintiffs in this case.

As the presumption is "that official duty has been
"regularly performed."

Sub. 15, § 1963, C. C. P.

And "that a writing is truly dated," Sub. 23, § 1963, C. C. P., then this Court must presume that the United States Surveyor General did in January, 1868, either have the swamp and overflowed land along Buena Vista Slough surveyed, or under the Act of July 23, 1866, adopt a State survey

of such land. There must have been a survey of the land by the State authorities or the United States Surveyor General, or patents could not have been issued for the land. In fact there is a recital in the patents from the State of California to the plaintiffs of the even sections conveyed by this deed of May 28, 1870, "that the tracts of swamp and overflowed "lands hereinafter described, have been duly and "properly surveyed in accordance with law" (T., II, fol. 52), and at folios 53, 55, 56 following, we find recited the numbers of the surveys. They are numbers 61 to 99 (with the exception of a few numbers), and number 177. By turning to the certificates of purchase for this same land, found on pages 70 to 97, Vol. V of Transcript, we find these same surveys referred to by numbers in certificates dated as early as January, 1870.

It will be said that these certificates of purchase are not in evidence. If such an objection is good, and can now be urged to defeat the appellants in this appeal, on the ground that it does not appear that the surveys were made prior to May 28, 1870, then it was error not to permit us to introduce in evidence the certificates of purchase, and show by them that the survey of the land ante-dated our deed of May 28, 1870, and the case must be reversed for such error.

Is there any uncertainty in the description of this deed in so far as it conveys the swamp and overflowed land that is situated in Township 29 S., R. 22 E.?

It conveys all of Section 1 (T., II, fol. 84), and 120 acres in Section 2 and 200 acres in Section 12 (fol. 80), and by looking at the map and plats in evidence we find all of the other lands in the township surveyed and platted as high land, and giving, as surveyed, the south and west lines of the 960 acres of swamp land

left in the township, and we find the north and east lines of such swamp and overflowed land only require to be projected north and east to give a perfect description and survey of the land, and as in any case a description is good that is sufficiently full and clear to enable a surveyor to locate the land, this description of the land occupied by the plaintiffs' tenants for five years prior to the issuance of patents for it, was not open to the objection of being void for uncertainty. If the reference to the United States Government survey be inapplicable or untrue, enough remains to show what was intended, and the deed must be upheld, the false or mistaken part being rejected.

Stanley v. *Green*, 12 Cal., 165;
Piper v. *True*, 36 Cal., 606;
Reed v. *Spicer*, 27 Cal., 57;
O'Farrel v. *Harney*, 51 Cal., 125;
Haley v. *Amestoy*, 44 Cal., 132.

It will be seen upon an examination of this deed that no reference to the United States survey is made in that part of the deed in which is described the 7262 $\frac{80}{100}$ acres of land in odd sections. (Fol. 83–85.) There was no uncertainty in the description of these lands.

If in a deed conveying land a certain survey is referred to, but the description is sufficient without such reference, the reference to the survey will be disregarded, if it does not indicate or describe the property.

Piper v. *True*, 36 Cal., 606.

Mr. McCray, when he goes to the land conveyed by that deed to find the sections, meets with no difficulty. We find by Exhibit "B" that he has not only been able to locate the 14,000 acres of land deeded to plaintiffs by the deed of May, 1870, but that he has shaded the land on that map, and that it forms one

body of land along the west side of the swamp land and bordering on the high land extending for a distance of 18 miles along Buena Vista Slough.

We call special attention to defendants' Exhibit "I," made by James and Macmurdo, two of the surveyors employed by defendants. On that map we find platted and colored red the very tract of land conveyed by this deed of May 28, 1870, and we find all the townships numbered and a number given to each section, and fraction of section, described in that deed. Not only are all of the witnesses of defendants are able to testify as to given sections in any township, but we find counsel in this case have platted on diagrams and accurately, the very land conveyed by this deed of May 28, 1870, which they claim is void for uncertainty of description.

On Diagram "C" of their brief they place all the even sectione lland described in that deed.

On Diagram "D" they place all the land in odd sections that is described in that deed.

On Diagram "E" we find in one body, colored in green and yellow, all the land conveyed by the deed of May 28, 1870, and showing it to be a continuous body of land along the west side of Buena Vista Slough for a distance of 18 miles.

The position of counsel for defendant is this: Their surveyors find no difficulty in locating the land in this deed of May 28, described, nor in placing it on maps made by them and offered in evidence. All their witnesses are able to specify just what section they are on when on the swamp land, and to fix such points as the Norton House, Bonestell House, Tule House, Round Corral, Dover's Camp, etc., giving the section upon which they are located.

Counsel themselves are able to locate the land and plat it on diagrams in their briefs.

The Superior Court is not only able to locate the land, but to add to its findings a map upon which the land described in that deed is platted, colored green and yellow, and place on each section or fraction of section its proper number.

After this showing to this Court, that defendants' surveyors, witnesses, counsel and the Superior Court had no difficulty in locating the land described in this deed, and in fact had located it, counsel for defendant would have this Court declare the deed void for uncertainty of description.

After this aid from witnesses and counsel, it would seem indelicate to tell the Justices of the Supreme Court that they are the only persons who are unable to locate this land.

We think the language of Mr. Justice Ross, when a similar claim was made in a case recently decided in this Court, was to the point, and is particularly applicable to the proposition advanced by counsel for defendant in this case, that "it would once strike any "one of the Bench as preposterous. We know of no "reason why we should not enjoy the privilege of "exercising a little common sense, and take the same "view of it."

People v. *Cowell*, 60 Cal., 402.

We do not believe the Supreme Court is going to admit that the able counsel for defendant alone are able to take a deed by its four corners, and say whether or not it is void for uncertainty, or induce this Court to declare that defendants' counsel are unable to do what they claim to have done, delineate on a map the land described in the deed of May 28, 1870.

We are satisfied that this Court will not be disposed to question the correctness of the platting of this land on the diagrams, so carefully done by able counsel, any more than it will question the law governing this

case, so clearly laid down and enunciated by the senior counsel for defendant, when occupying the position of Judge of the Supreme Court of a sister State. We are satisfied this Court will accept his understanding as to what this deed conveys, as well as his interpretation of the law governing this case, declared in a case that is recognized as a leading case on the question of riparian rights.

The learned counsel for defendant can hardly say that they were wrong when they platted the land described in the deed of May 28, 1870, nor claim now that they cannot tell what land that deed described.

Nor can the senior counsel for the defendant consistently say that he was wrong in deciding the case of *Van Sickle* v. *Haines*, in Nevada. Nor will this Court hastily overrule a case presented as that was by able counsel, and recognized as a leading case on the question of riparian rights; especially as the opinion was written by one of the most able jurists who ever sat on the bench on the Pacific Coast, and concurred in by a judge of great experience and industry, who said:

"*After as thorough an investigation as I am capable* "*of making, I feel constrained to concur in the position* "*so fully elaborated by the Chief Justice, that on every* "*point essential to the case of the petitioner,* NOT "MERELY THE WEIGHT OF AUTHORITY, "BUT ALL THE AUTHORITIES ARE AGAINST "IT."

We also have a finding of the Court (No. 18) that a map annexed to and made part of the findings "cor- "rectly shows the body of swamp and overflowed land "within Kern County, which is referred to in these "finding as Buena Vista Swamp."

This map, as we have before stated, shows that all the land described in the deed of May 28, 1870, in fact all the land along Buena Vista Slough, to be sectionized, with numbers placed on each section.

In brief, the proposition put forth on page 21 of defendants' brief, that the deed of Baker and others to plaintiffs herein is void, because the land purported to be conveyed cannot be ascertained, is as much as to say that this Court cannot understand what is clear to everybody else.

Again, the second finding, that plaintiffs, prior to the dates of the patents to them from the State of California, February, 1876, and later, had "*no right,* "*title, interest, claim, demand* * * * *legal or equit-* "*able, of, in or to the said land, or any part thereof,*" is negatived by the testimony of F. M. Epperly, which is not in any manner impeached or attacked.

In 1871 the witness, Epperly, moved on to this swamp and overflowed land, and settled at Dover's Hog Camp, on Section 1. (T., II., fol. 2171.) He rented lands from Mr. Crocker from 1871 to 1876, living all the time at Dover's Hog Camp, on Section 1. (T., II., fol. 2253--4.) This section is in Township 29 S., R. 22 E. (T., II., fol. 670), and one of the very sections conveyed to plaintiffs by the deed of May 28, 1870 (T., II., fol. 84), and by reference to the deed and Exhibit "I," or Exhibit "A," annexed to the findings, it will be seen that the 14,000 acres of land conveyed by that deed form a continuous and compact body of land along the west side of the swamp land along Buena Vista Slough.

This possession of plaintiffs' tenant, to say nothing of the possession of Mr. Crocker, to which we shall hereafter refer, of a portion of the land described in

the deed of May 28, 1870, surely gives plaintiffs some "right, title or claim," to the land.

From this possession they will be presumed to have been in possession of, and the owners of, all the land described in the deed of May 28, 1870.

C. C. P., Sec. 1963. Sub. 11 and 12

Walsh v. *Hill*, 38 Cal., 487.

The plaintiffs must have had an *equitable claim* to this land for at least one year prior to the issuance of the patent. A patent cannot issue until one year after approval of the survey (Sec. 3521, Polit. Code); therefore the surveys must have been approved not later than June 15, 1876, and the first payment for the land must have been made within fifty days after approval, or on or before August 4, 1876. (Sec. 3112, Polit. Code.) The presumption would be that all requirements of the law had been complied with. But in this case we are not left to deal with presumptions; it is recited in the patent that all the requirements of the Acts of the State Legislature have been fully complied with. (Vol. 2, fol. 56.)

To fully comply with such statute, the applications of plaintiffs must have been approved on or prior to June 15, 1876, and payment made on or before August 4, 1876, and after that date the plaintiffs had a vested right in the land, the State holding the legal title in trust for them.

Bludworth v. *Lake*, 33 Cal., 256;

Manley v. *Howlett*, 55 Cal., 97.

The certificates of purchase to the land which they must have held for months is by statute made *prima facie evidence of title*, and ejectment may be maintained upon it.

Stanway v. *Rubio*, 51 Cal., 41.

The patent dated September 11, 1876, for 760 acres must have been issued at least one year after approval

of survey also. It is recited in the patent that Miller & Lux are entitled to a patent for the land as assignees of Julius Chester (Vol. 2, fol. 44), and we have in evidence in this case the assignment of Julius Chester, in the form of a deed to Miller & Lux, dated and acknowledged May 28, 1870, conveying this very land to them.

So as early as 1870 the plaintiffs in this case had a claim to and interest in the land described in the patent of September 11, 1876.

The patent of February 17, 1876, relates back one year at least, or to February 17, 1875.

And the patent to plaintiffs for 29,188. 88-100 acres of land, dated January 18, 1876, relates back to January 18, 1875, or prior to any attempt of defendant to appropriate waters from Kern River.

It therefore clearly appears that the second finding is contrary to all the evidence offered as to when plaintiffs first acquired any interest in or title to the land conveyed to them by the State patents.

Counsel for defendant have never attempted to deny the correctness of our position, that the title under any State patent must relate back at least one year from its date. The statute is too clear to admit of any question on this point.

Let us now examine the evidence and see when plaintiffs first acquired an interest, *legat or equitable*, in the land described in the decree, in *People* v. *Center*.

The finding (2) is that the plaintiffs had not, prior to the filing of the decree, September 17, 1878, any right, title, interest or claim, *legal or equitable*, in the land.

The decree in *People* v. *Center*, awarding to the plaintiffs 7240 acres of the land in the amended complaint described, was obtained under proceedings authorized and taken under the Act of the Legislature,

approved March 20, 1878 (Acts 1877-8, p. 358), entitled "An Act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties."

To entitle parties to a decree awarding them land under that Act, they were required to appear in the case and file an answer within sixty days after the passage of that Act (May 19, 1878). They were required to allege and prove before they could procure such decree, that they were claimants under the parties who held a State patent to land; that they had paid State and County taxes on the land claimed by them; that they had paid, including the amount paid as taxes, at least $1 per acre on the land claimed by them in fencing upon or enclosing the same, and other improvements for its benefit; all such payments to have been made subsequent to November 11, 1867. Upon making such proof and procuring decree, the title of the State should vest as of the date of the decree.

By the decree, which is in evidence (Vol. 2, fol. 112) it appears that the plaintiffs did appear in the case of *People* v. *Center; that they had a direct deraignment of title from the grantees to the old State patent; that they paid full value for the land; that for many years last past they had by themselves and tenants been in the actual occupation thereof;* that they and their grantors had paid taxes on the land amounting to $1734.02; *that the plaintiffs had expended, since November* 11, 1867, *in reclaiming the land and for permanent improvements thereon, the sum of* $38,060, or more than $7.25 per acre outside of the amount paid for taxes.

Still, we have a finding that these plaintiffs, who have expended prior to May 19, 1878, (the last day they could have filed answer under the Act of March 20, 1878), the sum of nearly $40,000 on 7240 acres of land, had had no *right*, title, *interest*, claim to, demand *or* POSSESSION of it prior to September 17, 1878.

II.

This Second Finding finds also: 1st—That plaintiff had no POSSESSION of any of the land in the amended complaint described to which they held title by Patent from the State of California prior to the issuance of such patents, January, 1876, February, 1876, September, 1876, and June, 1877; 2d—That plaintiff had no POSSESSION of any of the land described in the Decree in People v. Center prior to the filing of such decree, or September 17, 1878. (Vol. I, fol. 345.)

Plaintiffs' witnesses testified fully to the possession of the plaintiffs from the time they made the first purchase of land, in 1870, down to the date of the trial.

Mr. Crocker's testimony is very full on this question of possession. Counsel only refer to part of this witness' testimony, which they claim goes to support the finding.

The testimony of this witness will be found in Vol. 2, Transcript, folios 488–9, 490–1–2–3–4–5–6, fol. 714, 715.

Then at folio 2379–83, Vol. 2, Mr. Crocker is recalled:

Mr. HOUGHTON:

" We desire, if the Court please, to ask Mr. Crocker a
" single question, which will make one point more clearly
" appear in the case, if it does not appear now.
" Mr. GARBER—Which point is that?
" Mr. HOUGHTON—*I don't know that it appears how long*
" *he was in possession of that land, and using it for grazing*
" *purposes.*
2380 " Mr. GARBER—I object to opening up the case.
" Mr. HOUGHTON—I simply desire to ask that one
" question.
" Mr. GARBER—*That has already been asked.*
" Mr. MCALLISTER—In looking over the testimony, we
" don't know that the proof on that point is distinct as to
" the date. We simply fixed the date that the plaintiffs

" had been using this land for the purposes of feeding
" their cattle.
" Mr. GARBER—I object to opening up the case.
2381 " Mr. McALLISTER—We don't seek to open up the case;
" simply to ask that one question.
" Mr. GARBER—They examined various witnesses on
" that point. *The witness has testified on that particu-*
" *lar point.*
" The COURT—*The recollection of the Court is that*
" *the witness testified he had been pasturing his cattle*
" *there.*
" Mr. McALLISTER—Your Honor is entirely correct;
" but he didn't testify the date when he commenced
" doing so. It is a mere omission on our part.
2382 " Mr. GARBER—*All right.*
" The COURT—*Proceed.*
" Mr. Crocker was then recalled, and testified as fol-
" lows:
" JAMES C. CROCKER, recalled for plaintiffs.
" Mr. HOUGHTON. Q—When did you commence pas-
" turing your cattle upon the land described in the
" amended complaint?
" A—In 1870, at the time we bought the land and
2383 " came in possession of it.
" Mr. HOUGHTON—That is all.
" The plaintiffs rest."

A portion of this answer was by the Court stricken out, and we call the special attention of this Court to what took place when such portion of this answer of the witness Crocker was stricken out.

It will be seen that this single question was asked the witness Crocker before plaintiffs had closed their case, and not after, as stated by counsel for respondents in their brief.

Mr. Houghton stated that he was in doubt as to whether it clearly appeared how long plaintiffs had been in possession of the land in suit and using it for grazing purposes. (Vol. 2, fol. 2379).

Mr. Garber objected, stating, "*This witness had testified on that particular point.*"

The COURT: "*The recollection of the Court is that*

the witness testified he had been pasturing his cattle there·" (Fol. 2381).

The question is asked and answered by Mr. Crocker. No objection at the time, is made to the answer. This took place May 2d. On May 3d the remarkable ruling is made striking out a portion of the answer of Mr. Crocker. And after being stricken out and a finding made, contrary to the evidence stricken out, counsel call special attention to the fact that, on their motion evidence was stricken from the record that would have rendered the finding open to our objection; that it is not supported by, but contrary to the evidence, and that, too, after both the Court and respondent's counsel objected to the evidence, going in on the ground that the witness had fully testified on the very point.

If this finding can be upheld, it must be because this evidence of Mr. Crocker, that he commenced pasturing his cattle on the land in the amended complaint described, when he purchased it in 1870, was stricken out, and the witness had not before testified to the fact, as claimed by the Court and by respondent's counsel.

In that case, respondent can only have the finding sustained by this Court at the expense of an erroneous ruling, striking out an answer that would have compelled the lower Court to have found against him, and in favor of appellant on this question of possession.

When we take into consideration the length of time that was consumed in its trial, from April 15, 1881, to June 2, 1881, and the number of witnesses called in the case, it is not surprising that counsel should overlook a single question, or be in doubt whether it had been asked and answered or not.

But it is surprising, when we take into consideration the additional fact of the magnitude of this case, that a Court should make a ruling like the one to which

we reserved an exception at folio 135, vol. III., Transcript, and particularly so when both the Court and adverse counsel object to the evidence offered, on the ground that it is already in the case.

In this connection, we call attention to the latitude granted defendants in recalling witnesses.

Mr. Fillebrown, one of the surveyors, was placed on the stand five times, recalled no less than four times. (T., III, fol. 949; T., IV, folios 239, 1056, 1453 and 1637.)

And when plaintiff's counsel express a hope that the witnesses of defendant will not be permitted to be recalled an indefinite number of times, the Court says:

"The COURT. I trust not myself. *The complaint in "this case covers a very large scope of country."* (T., IV, fol. 240.)

Defendants' witnesses, Walter James, F. P. May, J. D. Schuyler, L. Cruso, C. G. Jackson, L. L. Dixon, W. MacFarland were all recalled, and after they had fully testified, and in most cases days after having left the witness stand.

Still, when the plaintiffs once recalled a witness and but a single question is asked him, a portion of the answer to that question is stricken out, counsel insisting *that the Court did not give him permission to answer the question so fully as he seems to have answered it.* (T., III, fol. 131.)

The Court, at that time, does not seem to have taken into consideration the fact that the complaint covered a large scope of country, or that it was a case that counsel for plaintiffs could by any possibility overlook a question that should be asked a witness, and desire to recall such witness.

The rule applied by the Court to plaintiffs, when called upon to exercise its discretion in this matter of

recalling witnesses, was exceedingly rigid, while that applied when the defendants ask the same favor, was correspondingly liberal.

Counsel for respondent, to support this finding, refer also to the testimony of F. M. Epperly, who leased land from Crocker from 1871 to 1876, and lived at "Dover's Camp," on Section 1, T. 29 S., R. 22 E., and add (page 34) "this was one of the sections ac-
"quired by plaintiffs under the decree in *People* v.
"*Center* (T., II., fol. 105), in and to which we have
"shown above, plaintiff had no right, title or interest
"whatever, prior to September 17, 1878, *to which in*
"*fact they did not even attempt to show color of title prior*
"*to that date.*"

Counsel seem to have overlooked the fact that this very section is conveyed to plaintiffs by the deed of May 28, 1870. (T., II., fol. 84.)

The testimony referred to by counsel for respondent as supporting the finding, in no manner contradicts that of the witnesses Crocker and Epperly. It is simply to the effect that others had cattle along Buena Vista Slough during the year plaintiffs and their tenant Epperly were using the land for raising stock and hogs.

But Murray, the only cattle man called by defendant who ran his cattle along Buena Vista Slough, says (T., IV., fol. 1503) that Miller, Lux and Crocker were there with their stock prior to 1876.

Another witness of the defendant testifies very fully that plaintiffs were ranging their stock on the land in suit in the spring of 1875, and earlier. His testimony will be found at T., IV., fol. 1472--7 and on p. 108 of our first brief.

Admitting it all to be true, as claimed by respondent's counsel, that other parties did have cattle on the same

land, it would be a mixed possession; and, in such cases, the presumption is that a party having title is in possession. "Where two persons are in possession, "whether it be of a tract of land, or of a house, it is "his possession who has the right."

Angel Lim. Sec. 410;
Davidson v. *Beally*, 3 H. & McHen., (Md.) 621;
Smith v. *Yule*, 31 Cal., 184.

Counsel do not claim that they called any witness to meet the testimony given by us as to plaintiffs' possession. They, in their brief, only refer to a portion of the testimony of plaintiffs' witnesses and to a portion of the testimony of J. P. Murray, one of their witnesses, where he says he saw no pumps along Buena Vista Slough in 1871; and right here it will be seen that the position taken by counsel at the commencement of that part of their brief which they devote to our objection, that the findings are not supported by the evidence, "that they shall confine themselves to "pointing out not all the evidence tending to prove "particular facts, but sufficient *merely* to support the "finding," is not one that this Court will support them in. They cannot rest their case upon giving such evidence as shall *in their judgment* merely (barely) sustain the finding.

Counsel cannot, with any degree of success, or in any fairness, select a portion of plaintiffs' evidence on this question of possession and pass over the balance and then claim that the evidence supports a certain finding, because such portions of the testimony as they select does not make a clear case of possession.

Let us see if they have fairly stated the evidence of a single witness who testified in relation to the possession of plaintiffs prior to 1878. Pages 27, 28, 29, 30 and part of 31, 32, 33 and portions of 38 and 39 of their brief purport to give the evidence of Mr. Crocker on this question of possession.

Mr. Crocker testified, T., II, fol. 488–9, as follows:

"Q—*When did you again visit the slough?*

" A—*I could not tell you exactly when I visited it,* but
" I have been on the slough from that time up to the
" present time. *I probably got back the same month.* I
" was continually working after that time off and on. *I*
" *have been there more or less the most of my time since,*
489 " *every year. I have been raising cattle and engaged in*
" *the stock business.*

" Q—*Between what points have you ranged your cattle*
" *on that slough since* 1879?

" A—*Well, we have generally ranged them between the*
" —in former years from the Buena Vista Lake they
" ran to Tulare Lake; and some scattering cattle even
" further north and further south than that. That was
" where we calculated to keep those cattle—within
" those bounds."

Counsel, in their brief, purport to give, *in quotation marks,* the evidence of Crocker as it appears on fol. 488–9, but they leave out the portion above that is italicized.

Again Crocker testifies:

"It was full, but not near as full as it had been in
" previous years. No one pumped water in Buena Vista
" Slough in 1871, according to my recollection. I think
" I am pretty positive about that.

" The Witness: I would like to correct a statement I
" made, at least have time to reflect on it. I am not pos-
" itive, but I think we did pump in 1871. I think we
" did."

T., II, fol. 558.

See page 29 of defendant's brief, where they claim to give again, in quotation, this evidence.

Counsel claiming to give the evidence of Crocker on this question of possession, they further quote (?) from folios 485–6, 488–9, 494–5, 498–9, to show that Crocker's testimony sustained the finding that plaintiffs were not in possession of the land prior to 1876. Why did they omit the following testimony of Mr. Crocker, on folios 491–4:

"Q—How about 1871?
" A—I think in 1871 we commenced working in the
" swamp. We were attracted in there by seeing cattle on
" the high points—cattle that had been surrounded by
" high water, and we commenced working in there to take
492 " them out. *I was through the swamp considerably in*
" *that year, in* 1871; *also in* 1872.
" Q.—*What were you doing on the slough with your*
" *cattle from* 1872 *to* 1876?
" A—*We were raising cattle—working with cattle all of*
" *the time. When I first went there we estimated to have*
" *about* 1200 *head of cattle. That was in* 1869. *I could*
" *not tell how many I had in* 1876. *I had bought a great*
" *many and raised a great many. I could not make an*
" *estimate. We might have had* 10,000, *or might have*
" *had* 15,000; *I could not tell. I think we had at least*
493 " 10,000 *cattle. We were in those times taking cattle*
" *away, and bringing cattle there, during that time. I*
" *suppose we had about the same number during the*
" *years* 1873, 1874 *and* 1875 *as we had previously.*
" Q—*Were you running those cattle on this land in*
" *suit?*
" A—*Not all of them, but the greater portion of them.*
" We had some portion of the cattle that we had raised
" in the hills, and we used to take them down there, and
" drove them to the swamp; but they would not stay
" there. They would go back to their range, where they
494 " were accustomed to ranging.
" Q—*In working in that swamp, as you style it, Mr.*
" *Crocker, with your cattle, from the year* 1869 *to the*
" *year* 1876, *were you all through that swamp, and cross-*
" *ing the channels?*
" A—*Yes, sir; I think I have been on every acre in*
" *that swamp, from one end of it to the other, at dif-*
" *ferent stages of water. At high water, of course, I was*
" *not in so frequently.*
" Q—*In handling your cattle there would you cross*
" *it from one side to the other?*
495 " A—*Yes, sir.*"

T., II, fol. 491-4.

In place of all this testimony of Mr. Crocker, as to his possession from 1869 to 1876, counsel for defendants give the following, in quotation marks, as the testimony of Mr. Crocker, and refers to fol. 494:

" In working in that swamp with our cattle, from

" the year 1869 to the year 1876, we were all through
" the swamp. In handling our cattle we would cross
" from one side to the other." See page 28 of respondent's brief.

And this is a fair sample of their pretended quotations from the Transcript, from one end of their brief to the other.

The foregoing, taken from the first few pages of defendants' brief, are sufficient to show that very little, if any, reliance can be placed upon the portion of their brief that is in quotation marks.

Then we have the testimony of Mr. Crocker on a full, direct and cross-examination, where he is questioned in relation to the condition of Buena Vista Slough, for each year, from the time plaintiffs purchased the land, in 1870, to the date of the trial, showing conclusively that he was pasturing his stock on the land in suit continuously for nine years prior to the commencement of this suit, and six years prior to the date of the oldest patent issued to plaintiffs by the State of California.

No effort is made by the defendants to show that the plaintiffs were not in possession of the land described in the amended complaint, but counsel would have this Court disregard all the testimony relating to possession given by Mr. Crocker and all the other witnesses, because, as they claim, Mr. Crocker at one time testified that 1871 was a dry year, and very little water ran down in Buena Vista Slough, and again, that Buena Vista Slough was full of water in 1871.

While in this regard there may be a seeming contradiction in the testimony of Mr. Crocker, an examination of all the testimony given by him shows that there is in fact no contradiction at all. Buena Vista Slough, extending from Buena Vista Lake to Tulare Lake, is over 50 miles long. All the witnesses testified that

1871 was a dry year. Still the water ran down the slough as far as the Dover's Hog Camp, some 15 or 16 miles below Wible's Headquarters.

Epperly, who moved to that camp in May, 1871, (T., II, fol. 2171), testifies:

"Q—When you went there in 1871, what was the con-
" dition of the water?
" A—Well, the sloughs were all full of water when I
" went there in 1871. I don't recollect just how long it
" ran there, but I think until August. Then it stopped
" running down where I was. I don't know how long it
" ran still above where I was, but down in the portion I
" was in it stopped running."

T., II, fol. 2173–4.

Mr. Crocker does say at fol. 490 (Vol. II), that water was running in Buena Vista Slough all the time in 1871, but he does not say it was running the whole length of Buena Vista Slough.

On cross-examination, Mr. Crocker says:

"Q—Well, in 1871, how was it?
" A—In 1871 it was—there was a slough with lots of
" water; it continued to come down with the flood of
" water; I suppose on account of the immense floods,
" that passed off—I mean the flood of 1868; I surmise
" that the flood of 1871 was still felt; it was felt around
" the lakes for a great many years. I don't know that it
" was from the effect of the floods that caused the fall of
548 " the water; it is only my impression. There was lots
" of water there in 1871. I think there was less water
" running in the river; I attribute that, perhaps, to less
" snow in the mountains. I don't think it was all cov-
" ered over at any time in 1871; there was considerable
" water running in New River in March, 1871.
" Q—As much as you saw there in March, 1868?
" A—In New River I think there was; in March, 1868,
" when I crossed, there was but a small amount running
" there; in 1868 there was but one stream running into
" Buena Vista Slough, until you got to Goose Lake.
" New River did not grow dry during the year 1871.
549 " Q—Was the slough full of water all that year?
" A—There was a good deal of water through the
" slough. There was a continuous stream of water from

"Buena Vista to Tulare Lake for the whole of 1871, *as*
"*far as I went there was.* I was in the swamp a good
"deal. The water was flowing all of the way through.
" Q—At the lowest place in 1871, how much water was
"running down through that slough?
" A—In most places it would swim a horse.
" Q—In the very lowest place?
550 " A—Yes, sir, in 1871.
" Q—Was it all confined to the slough at any time in
"1871?
" A—I think not, sir; portions of it over the slough.
"I know there was.
" Q—At any time in 1871 did it more than fill the
"slough; spread out over the land; to what extent at the
"driest portion of the year?
" A—Well, it would be a hard matter to say positively
"in any manner. There were places where it would flow
"back a quarter of a mile or half of a mile. In other
"places it would be confined to its channel. There were
551 "places where it would be confined to the channel, as
"marked on the map, as near as I can understand the
"map."

T., II, fols. 547–551.

At folio 558 the witness is again questioned about the condition of the water in Buena Vista Slough in 1871, and he promptly corrects his testimony given but a few minutes before. He says:

"No one pumped water in Buena Vista
"Slough in 1871, according to my recollection. I think
"I am pretty positive about that.
" The WITNESS—I would like to correct a statement I
"made, at least have time to reflect on it. I am not pos-
"itive, but I think we did pump in 1871. I think we
"did."

T., II, fol. 558.

Again he says:

"I have been ex-
568 "tremely familiar with the country ever since 1871, and I
"tell you as near as I can; I say that there was no water
"in that portion of the swamp in 1876 and 1877, and a
"part of 1878.
" Q—*All other years, so far as your knowledge goes, it*
"*had water on it for some time in the year?*
" A—*I believe so, except one.*

" Q—*What was that?*
" A—*That was in the drought of* 1871, *I think.*
" Q—Well, was there no water in the slough at all in
" 1871?
" A—There was; I could not tell exactly when it com-
569 " menced to run; it began along in the winter or spring;
" I think probably in March; I cannot tell exactly how
" long it continued to run; *I know it ran down the swamp,*
" *as near as I can recollect,* 15 *miles, and that stopped*
" *running;* I think it ran a couple of months; after that
" there was no water in the slough in 1871, only what was
" pumped and in the place on the slough right below
" Wible's Camp; standing water; water in pools; that was
" on the south end of Weed Island."

T., II, fol. 568-9.

Again:

"Q—What portion of the swamp land lying between
572 " Buena Vista and Tulare Lakes was covered with water
" at any time during the year 1871?
" A—The water ran down from the head of the swamp,
" from the south end of it. I call the head of the swamp
" the south end, or Wible's Camp, where the levee is. I
" call that the south end. When I speak of the south end
" of the swamp, I mean Wible's Camp.

T., II, fol. 571-2.

Then, at folio 574, in answer to a question put by defendant's counsel, he sums up the whole of his testimony as to the condition of the water in Buena Vista Slough during the dry year of 1871:

"Q—*How much of that swamp and overflowed land,*
" *from Wible's down to Tulare Lake, was covered with*
" *water in* 1871?
" A—*The water ran down the slough, about as near as*
" *I can recollect, from traveling over the country often*
" *and being acquainted with it; it ran down about fifteen*
" *miles. I think down the slough; but mostly confined*
" *to the slough. In places it was deep; in other places*
575 " *it was shallow.*
" Q—*Was it up to the tops of the bank of the slough?*
" A—*In some places it was.*"

T., II, fol. 574-5.

And at folios 592-3 he says:

"Q—Isn't there a well defined channel all of the way
592 "from Buena Vista Lake to Tulare Lake?
"A—A channel that carries water, there is.
"Q—Is there any one continuous, distinct, defined
"channel from Buena Vista Lake to Tulare Lake through
"there?
"A—I think there is. I am positive of it.
"Q—Have you followed it up all the way?
"A—I have been over it.
"Q—Every foot of it?
"A—I would not say over every foot of it. I have
"been over every quarter section of it.
"Q—You have never seen that channel that water was
593 "not running in it?
"A—Yes, sir; I have seen it when water was not run-
"ning in it many times.
"Q—How often?
"A—I could not tell you how often.
"Q—When was the first time you did that; no water
"running in it?
"A—In 1871."

Again, being questioned about Buena Vista Slough, in 1871, he testifies:

"Q—I am speaking of that point down to Tulare
607 "Lake. You saw the water running in this west
"channel?
"A—I saw it from where I struck the swamp, clear
"down. I did not go into the centre channel. I did not
"tell whether there was water in it or not. The first
"time that I saw water running in the centre channel,
"was, I think, in 1870 or '71. I could not tell posi-
"tively.
"Q—How much water was running in it, in that chan-
"nel then?
"A—Well, it was swimming. It was probably in
608 "March or April when I went in there.
"Q—How deep was the water at that point where the
"banks got wide and sloping, and not well defined? I
"am talking of, below the point where the banks were
"well defined.
"A—Where it broke out?
"Q—Yes, sir; below the point where you call the
"banks well defined.
"A—We didn't go across that water in those times.
"Q—You saw the water running in below the point
"where it is well defined?

" A—Yes, sir.
" Q—What sort of a stream of water was running in
609 " there in 1871, at the time you speak of?
" A—There was a big stream of water running in there.
" I could not tell how wide or deep. I did not go in
" there.
" Q—How wide have you ever seen the channel run-
" ning in there?
" A—I have seen the water from one margin of Weed
" Island to the outside.
" Q—At this time in 1871, what sort of a stream was
" running in this channel?
" A—That swam our horses. We got into it. We
610 " crossed on horseback. I think we swam this channel
" in different places on that slough to get on to Weed
" Island. I presume we swam—but I won't be positive
" —our horses 50 or 60 feet.
" Q—Do you mean that there is one distinct channel
" in this west channel, and then you came to dry land,
" and then found another channel?
" A—Yes, sir.
" Q—And then you got on dry land, and then found
" still another channel?
" A—Yes, sir; there were 3 distinct streams running
611 " down there in 1871.
" Q—How wide was each of them?
" A—Well, running down through the centre it did not
" vary much in width.
" Q—How wide was it?
" A—As near as I can recollect, about 50 or 60 feet
" wide.
" Q—Filled with water to the top of the bank?
" A—Plenty of water at that time, when the water was
" coming down; it had as much water as it could hold at
612 " that time, and dry land was in between them; no great
" amount.
" Q—Wasn't the whole country covered with water at
" that time?
" A—No, sir; I think that was in April or May, 1871;
" it might have been in 1870; but I think it was in 1871.
" Q—Now, along there in the spring of 1871, you saw
" these three streams running with that amount of water
" all full?
" A—Yes, sir.
" Q—How long did that water continue to run in that
" year, in that way?
" A—It ran in that way until along in the latter part
" of the season. It stayed all during the season.

613 " Q—To what time?
" A—I suppose it was running—I could not say pos-
" itively.
" Q—What do you mean by a whole season?
" A—The whole year.
" Q—The whole year?
" A—Yes, sir.
" Q—Are you positive about that?
" A—I think so.
" Q—Did you see that in 1871? that state of affairs?
" A—Yes, sir.
614 " Q—Take your time to think and see if you are sure
" about that?
" A—I think I am. We had to swim our horses across."

T., II, fol. 607–614.

It will be seen that he is here testifying to the condition of the water in Buena Vista Slough at Weed Island, when all the witnesses testified that it was running in 1871.

On re-direct examination, he is requested to fix definitely the dry year and when he first went into possession, there being some doubt as to whether it was in 1870 or 1871, and he testifies:

"Q—You have spoken of the fact that there was a
" dry season when you pumped there in the year 1870
" or 1871. Can you fix the year? I have not the testi-
" mony before me. There was a dry season you testi-
" fied to, I understood you, in answer to a question that
" Mr. Garber asked you, either in 1870 or 1871?
" A—In 1871.
" Q—How do you know that was in the year 1871?
" A—We had to pump, and other things in connec-
" tion with it that I know of.
" Q—Well, what other things?
715 " A—Well, there is one circumstance that I know of.
" We bought the land there in 1870, and immediately
" after that I rigged up the pump and we went to
" pumping.
" Q—Then it was after you bought the land and
" went into possession—the year after you bought the
" land and went into possession, that there was that
" short season of water?
" A—Yes, sir; 1871."

T., II, fols. 714–15.

It will be seen by the Court, how persistently counsel for the defendant tried, by repeatedly returning to the year 1871, to get this witness to contradict former statements made by him, at some time, during the three days he was on the stand as a witness. Only once did they draw anything from this witness that was in any manner contradictory of his repeated statements that 1871 was a dry year, but that water ran down Buena Vista Slough at least fifteen or sixteen miles, and then we find the witness qualifying his statement. He says: "There was a continuous stream "of water from Buena Vista to Tulare Lake, for the "whole of 1871, *as far as I went there was.* I was "in the swamp a good deal. The water was flowing "all the way through." The witness here only states that the water was flowing as far as he went and that the water was flowing all the way through, but he is not asked, nor does he testify, whether a stream is flowing all the way from Buena Vista Lake to Tulare Lake during all the year 1871. And later, at Vol. II, fol. 558, seemingly for fear he has been misunderstood, he, of his own motion, says: "I think we did pump in 1871," etc.

Mr. Crocker is styled by counsel for defendant "a ready swearer," because of this testimony relating to the condition of the water in Buena Vista Slough. He was too ready a swearer for defendant, as were all our witnesses, who had spent the best years of their lives in business pursuits on Buena Vista Slough. Ready, because he was thoroughly acquainted with the subject upon which he was being interrogated, and not testifying merely from a knowlenge acquired by a single trip, occupying a day or two, made to a strange country, and for the sole purpose of qualifying himself as a witness in this case. The defendant had a complete monopoly of that class of witnesses.

F. M. Epperly testified that he leased land on Buena Vista Slough of Mr. Crocker, one of the plaintiffs, as early as May, 1871, and continued to occupy the land until 1876.

He says he moved to Dover's Hog Camp in May, 1871, and continues:

" I was living there all that time and raising hogs.
" Q—Where were you running the hogs during that
" time?
" A.—I was running them in on the tule land there, on
2171 " Buena Vista Slough, between the lower end of Weed Is-
" land—well, it was running down about nine miles of
" front there, that my hogs ran on, nine miles north from
" Weed Island. I don't know that I can tell you exactly
" where the lower end of Weed Island will come on the
" map, but it is about two miles below the Bonestell
" House."

T., II., fols. 2171--2.

And on cross-examination, he testified:

" In 1871 I settled
" there at Mr. Dover's Camp—where Mr. Dover's Camp
" is; I don't know what section that is on; as far as the
" sections are concerned, I know nothing about the sec-
" tions, but I think it was Section 1.
" Mr. HOUGHTON—That is Dover's Camp? Section 1,
" T. 29 S., R. 21 E.?
" A—I came there sometimes in May, and my business
" was caring for hogs at that time; I owned hogs; I
" owned no land there; *I got land of Mr. Crocker there;*
" *rented it from him. I came there in May,* 1871, *and I*
2254 " *left there in May,* 1876*; I was there five years; the*
" *range for my hogs was from the lower end of Weed*
" *Island down to about five or six miles below the Dover*
" *Camp—making a distance, I should think, af about*
" *nine miles—eight or nine miles in length, the range*
" *that my hogs ran over; might be more; might be less;*
" *I couldn't say.*
" Q—*How much land did you rent from Mr. Crocker?*
" A—*I rented with the privilege of running hogs in*
" *there; no particular land specified at all; I could not*
" *tell exactly how much I did pay him for it; I worked for*
" *him a great deal; I never paid him anything in money;*
2255 " *what I did pag him was in work; a portion of the work*

"*he paid me for, and a portion of it he did not; it was*
"*understood that I should look out for stock there, and*
"*attend to the stock there, for the privilege of running my*
"*hogs there; I attended to the cattle; when I saw any in*
"*distress, bogged down or anything of that kind, I re-*
"*lieved them; that was understood with Mr. Crocker*
"*when I went there that I should do that for the priv-*
"*ilege of running my hogs there; he paid me for my work*
"*at the pumps.*"

T., II., fol. 2253–5.

Then we have the judgment in the case of *People* v. *Center*, which could not have been entered under the Act of March 20, 1878, unless the plaintiffs owned the land and were in possession of it, and had expended a large sum of money in improving the land, and had also paid taxes on it. And the Court finds in that case:

1st. That plaintiffs' claim title to the land by a direct deraignment of title from W. F. Montgomery and others, the grantees of the State, under the Patent of November 11, 1867.

2d. "That they paid full value for said land."

3d. "*And are now, and for many years last past have*
"*been, by themselves or tenants, in the actual occupation*
"*thereof.*"

4th. That they and their grantors have, prior to the judgment, paid taxes on said land amounting to $1734.02, and have "expended since the 11th day of
"November, 1867, in reclaiming, *and for permanent*
"*improvements upon said land the sum of* $38,600."
(T., II, fol. 112 and 113.)

Still, the lower Court finds that plaintiffs had no possession of any part of the 7240 acres of the land described in the judgment or decree in this case prior to the *filing* of the decree in *People* v. *Center*.

We find Mr. Epperly living in about the center of this land conveyed to plaintiffs by the deed of May 28, 1870, on one of the sections described in that deed,

Section 1, T. 29 S., R. 21 E., and one of the sections described in the Decree in *People* v. *Center*, and leasing land from Mr. Crocker, which he used to raise his hogs upon, until 1876, or five years and upwards.

He occupied, it seems, nearly all the land covered by this deed of May 28, 1870, and he says during that time Mr. Crocker was also using the land, pasturing his cattle upon it, and he, Epperly, paid his rent, in part at least, by attending to the cattle of Crocker.

This entry of Epperly, as Crocker's tenant, was an entry by Crocker under color of title, is co-extensive with the premises described in the deed.

Angell Limitations, § 400.

The entry was made upon a section included in the patent to W. F. Montgomery and others from the State of California, under which plaintiffs claimed title.

Possession of land under a grant from the State is possession under color of title, and adverse, even when the grant is void for irregularity.

Moody v. *Fleming*, 4 Geo., 115.

Counsel give the evidence of but a single witness (J. P. Murray), called by defendants to support this finding as to the possession of plaintiffs prior to 1876. The evidence given by defendant of Mr. Murray will be found at page 35 of their brief.

If counsel had turned back one single page, he would there have found this witness testifying fully as to Mr. Crocker's possession as early as 1869.

Commencing at T., IV, fol. 1502, the witness testifies:

" "Q—*When did you first see Mr. Crocker anywhere in*
" *this country that you have been speaking about—this*
" *swamp country here?*
" A—*Well, sir, the first time I knew Mr. Crocker having*
" *any cattle in this country, say in* 1869 *or* 1870, *I met his*
" *men through here, and I knew his cattle. They were*

" *working down there in the swamp branding on the west*
" *side and all the way through the whole country here.*
" There were cattle in every place. I saw them, I think, the
" first year—the first year I met Crocker's men, I think it
" was on the east side of the swamp, down below Goose
1503 " Lake, between there and what is called the Tule House.
" *Mr. Crocker had cattle all over the country.* I don't know
" that I saw them that particular season. I have seen his
" men all over Tulare County, going up to Fort Tejon and
" Santa Maria, attending all the rodeos—Linn's Valley,
" Poso Creek, up Kern River—on Tule River and north
" of Tule River.
" Q—During that year, 1869, what other people, besides
" Mr. Crocker, had cattle through there—the country you
" have spoken of?
" A—Well, everybody had cattle there. In 1869 I was
" working all the way up from Tulare Lake towards Buena
1504 " Vista Lake and Kern Lake, and upon the river, and dur-
" ing the year 1869. I was all over the country a great
" portion of the year; that was my business; I had nothing
" else to do; I was there in spring, summer and fall. I
" saw no stakes there that year to mark the boundaries.
" I noticed lots of brands that year in the country. They
" were all through here, clear from King's River. Tom
" Fowler had cattle there from King's River. I don't know
" how many brands there were about there in 1869-70.
" There were a great many cattle near in the country. I
" think during the years 1869, '70 and '71 there were prob-
" ably 40,000 or 50,000 cattle there, or more. Pat. Mur-
1505 " phy had cattle there; Mr. Jones, I think; *Crocker had*
" *cattle there; and Miller*, and Cox and Clarke. *I mean*
" *Henry Miller, or Lux & Miller*, and Lynch and Fowler,
" and Blakenship, Bacon, and one or two or three of his
" boys. I don't know exactly how many I had there; I
" never counted them. In 1870 I think I could have sold
" my cattle for 2500 cattle. They were probably worth
" $10 a head. That would make $25,000. I was there
" also 1871. That was a dry year. I worked all through
" there with my cattle in the fall, spring and summer. I
1506 " don't think there were any pumps down there on the
" country between Tulare and Buena Vista lakes in that
" year; I saw none there; if there had been any I should
" have seen them; I think I was all through there. 1869
" was a pretty good year for cattle feed. In such a year
" as that the swamp land is not worth much as feeding
" ground. In a good year we don't want our cattle run in
" the swamp. We drive the cattle there in bad years to

"save their lives. In a good year they would run
"out on the plains east and west and north and
"south wherever they could get alfileria. In good
1507 "years we would not have the cattle in the swamp
"until late in the summer or fall. I think Mr. Crocker
"had a corral in Antelope Valley. He had a good
"many cattle in there. I have seen his cattle up that way.
"That is some fifteen miles west from the swamp land. Up
"through there there would be plenty of feed, except in
"dry years; plenty in good years. The cattle would range
"all over that country. I was a good deal through that
"swamp in the year 1871. In dry years I was there more
"than I was in good years, because my cattle did not run
"there much in good years. It was pretty dry along in
"1871. I spent a good deal of my time there that year.
1508 "In dry years you could get around better. Then, when
"there would be good feed, the cattle would run out on
"the plains; it was not necessary to go into the swamp
"so much.

"Q—How is it as to the amount of care that cattle re-
"quire in a dry year, compared with a wet year?

"A—You had to rush around there to find feed and
"water to save them. In 1871, I was driving cattle, pick-
"ing them out of places where they were not doing very
"well, and driving them there, where they would do well;
"driving them up in this country, on the island. I think
"I was all over this swamp land district during that year.
1509 "I had to go over it to try and find my cattle. I didn't
"want to lose my calves. There were other cattle men in
"there, and I wanted to keep even with them."

T., IV, fol. 1502–9.

See how cunningly counsel, by commencing with fol. 1507–8, going back to fol. 1505–6, and then back to fol. 1504, manages to leave out all reference to the fact that Mr. Crocker and Miller and Lux were, during all the time he was acquainted with this land, running large numbers of cattle on it.

Again counsel, referring to the testimony of McFarland (page 37) says:

W. McFarland (for defendant), says:

"That in 1872, Crocker was living at the Templor
"Ranch; also in 1875. That that was Crocker's head-
"quarters at the time." (T., IV, fol. 1471.

But they fail to give the testimony of McFarland, called out by themselves, that Mr. Crocker occupied the land in suit with his cattle in 1872; and later this witness says:

"Q—What did the cattle have to live on in that section of the country? What was the kind of growth?
" A—None close to the mountains. Alfileria, where there
" was any; where there was not, they didn't have it. I was
1471 " next at the Templore in the spring of 1874. I under-
" stood it was Mr. Crocker's headquarters at that time. I
" think he lived there. He was living there in 1872. I
" was also there in the spring of 1875, along in March. I
" think Mr. Crocker was living there then. I don't remem-
" ber. Mr. Crocker moved down here sometime, I think,
" in 1875; moved his family down here, I think, in the
" spring of 1875—in fact, I am positive that he was there
" in 1875. That was his headquarters at that time.
" Q—*How far did he range his cattle, to your knowledge,*
1472 " *around there, for instance,* 1872, '74 *and* '75, *the times you*
" *passed along through that section?*
" A—I never went any further around than the Polonio
" Pass. I have seen cattle all along there in the spring of
" the year. *I saw cattle all down Buena Vista Slough*
" *or the swamp. I mean the swamp land district down*
" *there.*"

T., IV, fols. 1470-72.

Continuing his testimony as to where he had seen the cattle of plaintiffs, he says:

" Q—You said you had seen cattle ranging down here
1477 " in Antelope Valley and Polonio Pass?
" A—Not in the pass. I have seen them along in here
" (showing), in Antelope Valley.
" Q—Have you seen them ranging anywhere else on
" that map?
" A—*I have seen them down in the swamp land all*
" *along, as far as Epperly's hog camp, or what is called*
" *Epperly's hog camp now.*
" Q—How far up towards Kern Lake have you seen
" them, or Bakersfield?
" A—I have seen them in early times—I think I saw
" Crocker's and Miller's & Lux's cattle down at Canfield.
" *As a general thing, when you go down the slough here,*
1478 " *across the slough at Tracy's crossing, you would probably*
" *commence meeting a few of the cattle away down; some-*

" *times would be in a big band and sometimes only a few.*
" Q—Did you ever see any headquarter appearance of
" this swamp land district 121?
" A—No, sir. I never knew anybody that lived beyond
" that point but Epperly, between Tracy's crossing.
" Q—*Did you ever see Crocker's camp down there?*
" A—*I have seen Crocker's vaqueros along there, rodeoing.*
" Q—*What preparation in the way of a camp, down in*
1479 " *the swamp land district?*
" A—*The same as any rodeoing party; had the outfi*
" *along with them.*
" Q—*Did they have their wagons and teams?*
" A—*Yes, sir; they had a regular camp outfit along.*
" Q—*Any indication of a permanent locality?*
" A—*No, sir.*
" Q—*Well, was it any different from what other cattle*
" *men carry along with them in all their camps—the gen-*
" *eral range of cattle parties?*
1480 " A—*No, sir; the same as I have seen them have—all*
" *parties.*
" Q—Have you ever seen any cattle ranging in that
" swamp land district belonging to other people?
" A—Yes, sir.
" Q—What people?
" A—Well, I don't know the brands of all of them. I
" only know by seeing the different brands, and being ac-
" quainted with other parties that had cattle in there that
" were rodeoing."

T., IV, fol. 1476–1480.

We are satisfied that this Court, in this case, will hold that the evidence was overwhelmingly against this finding, in so far as it finds—

a. That plaintiffs were not in possession of any of the lands described in the amended complaint, to which they hold title by patent from the State of California, prior to 1876.

b. That they were not in possession of any of the 7240 acres of land described in the decree in *People* v. *Center*, prior to its entry, September 17, 1878.

And that this Court will in this case declare that this second finding of the Court below cannot be up-

held by this Court under the rule, in respect to findings when there is a *substantial* conflict in the evidence.

Branson v. *Caruthers*, 49 Cal., 381.

"And that there is not such a conflict as to bring it " within the rule heretofore adopted by this Court."

Carpentier v. *Gardiner*, 29 Cal., 164.

In conclusion, we call the attention of the Court to the fact that the Judge of the lower Court, on the trial, stated that his recollection was that Mr. Crocker had testified to having been in possession of the land in suit in 1870, when we desired to fix the year he entered into possession (T., II, fol. 2381). And that he aftewards, on motion of respondents' counsel, struck out the statement of Crocker, that he entered into possession of the land in 1870, when he purchased it, and then finds against us. How the Court could make such a finding after ruling out the evidence of Crocker to disprove it, we cannot conceive.

Estate of Pacheco, 23 Cal., 481.

The testimony of the witness Crocker offered by us, to prove the fact that plaintiffs entered into possession of the land in suit in 1870, when they purchased it, was competent to prove such fact.

It was rejected or struck out by the Court on motion of defendants, and they will not now be permitted to allege or claim that the plaintiffs failed to prove such fact.

Thompson v. *McKay*, 41 Cal., 221.

III.

We desire to call particular attention to the several findings as to the condition of Buena Vista Slough from where Kern River enters it down to Section 24, T. 29 S., R. 23 E., or the Bonestell House.

In our brief, on file, p. 424–5, we call attention to the fact that the findings as to the existence of a continuous slough to the Bonestell House are clearly contradictory, and counsel do not, and never have, claimed to the contrary.

The findings are:

3.

"That the said lands of plaintiffs are situated in and
" form part of the body of swamp and overflowed lands
" designated in these findings and on the map hereto an-
" nexed as Buena Vista Swamp, but that said lands do
" not, nor does any part thereof, border on Buena Vista
" Slough, nor are said lands or any part thereof situated
" along Buena Vista Slough, except that as is set forth
" in findings 18, 71 and 72. The channel of said slough
" is traceable through the west half of Section Ten (10)
" and northeast quarter of Section Five (5), in Town-
" ship Thirty (30) south, Range Twenty-four (24) East,
" and as far north as Section Twenty-four (24), in Town-
" ship Twenty-nine (29) south, Range Twenty-three (23)
" east, Mount Diablo Base and Meridian; and that the
" said lands of plaintiffs are, as shown on the annexed
" map, situated in said Buena Vista Swamp, to which the
" term Buena Vista Slough is sometimes applied.
"
" 46.
"
" That no water course or natural stream flows or flowed
" to, along, by, through, over or upon said lands of plain-
" tiffs, or any part thereof.
"
" 71.
"
" That from the point where New River enters Buena
" Vista Slough, a channel extends southerly into Buena
" Vista Lake, as shown upon the map hereunto annexed.
" That from said point where said river enters said
" slough to and into Buena Vista Swamp as far north as

" Section Twenty-four (24), Township Twenty-nine (29)
" south, Range Twenty-three (23) east, there is a trace-
" able, but in places detached channel (shown on the
" annexed map, and thereon designated as Buena Vista
" Slough) of varying width and depth. That from the
" river northerly to said swamp, said channel is well
" defined, but after reaching said swamp to its northern
" extremity in said Section Twenty-four (24), said chan-
" nel is not well defined nor continuous, and is not a
" defined natural channel with bed and banks, but con-
" sists more of a series of holes than a regular water-
" way. That said channel terminates in and is not
" traceable beyond said Section Twenty-four (24).
"
"
" 72.
"
" That the portion of Buena Vista Slough from New
" River to Buena Vista Swamp, though continuous and
" well defined, is in places shallow and does not consti-
" tute a water-course, and the waters which form the
" overflows, elsewhere in these findings mentioned, reach
" said swamp over the surface of the country; are not
" confined to the bed and banks of said slough, but
" spread and flow as well over the adjacent country as
" through the slough itself; and that such flow is not
" usual, definite, or accustomed, as is, nor does it corre-
" spond with that of the waters in Kern River before
" reaching Buena Vista and Kern Lakes, but is only oc-
" casional, as is in these findings elsewhere described.
" That the slough or channel marked on the annexed
" maps as Buena Vista Slough is as far northward as, and
" until reaching Buena Vista Swamp, known as and
" called, Buena Vista Slough; but after reaching said
" swamp and ceasing to be well defined or continuous,
" as in these findings set forth, it ceases to be distin-
" guished as Buena Vista Slough, and the term Buena
" Vista Slough is then applied to and used to designate
" the whole of said swamp, and not any particular chan-
" nel therein."

Then we have the 18th finding, and as a part of it a map, "Exhibit A," showing Buena Vista Slough down to Bonestell's, and through Sections 10 and 5, T. 30, R. 24, land described in the amended complaint, and

showing the "in places detached channel" that in finding 71 we are referred to as preventing Buena Vista Slough from being a continuous watercourse to said Section 24.

These findings are contradictory. This we have made to appear clearly on pages 424–5 of our first brief, and that this Court will reverse a judgment of the lower Court in case the findings are contradictory, we refer, in addition to the cases cited in our first brief, to a case decided by this Court since this case was argued,

Carmen v. *Ross*, XII, P. C. L. J., p. 266,

in which the Court say:

"The findings are contradictory. The Court, in "effect, found that each party was in possession of "the property sued for when the suit was commenced. "We cannot see how any judgment could have been "pronounced on such a contradiction."

In this case we have a finding—

(1) That there was a watercourse through plaintiffs' land and to Section 24, T. 30 S., R. 24 E. (3d finding.)

(2) Then, again, that there was *no* watercourse through any of plaintiffs' lands. (46th finding.)

(3) That "there is a traceable but in places de-"tached channel to Section 24, T. 30, R. 24." (71st finding.)

(4) "That from the river northerly to said swamp "said channel is *well defined*." (71st finding.)

(5) "That the portion of the Buena Vista Slough "from New River to Buena Vista Swamp, *though con-"tinuous and well defined*, is in places shallow and does "not constitute a water course." (72d finding.)

With all the above contradictory findings, we cannot see how the Court below was able to enter any judgment. Were there no other error complained of other than the single one that the findings are contradictory, this Court must reverse the judgment of the lower Court.

If there be in this case a finding that Buena Vista Slough is not a continuous watercourse through any of the lands of the plaintiffs described in their amended complaint, it must be the 18th, which finds that the channel of Kern River and the slough (Buena Vista) and lakes in the complaint mentioned "are *correctly* " *and fully shown and delineated* on the map hereto " annexed and marked Exhibit 'A,' and made a part " of these findings."

And again, in the 71st finding:

"That from the point where New River, enters Buena " Vista Slough, a channel extends southerly into Buena " Vista Lake, as shown upon the map hereunto annexed. " That from said point where said river enters said " slough, to and into Buena Vista Swamp as far north " as Section twenty-four (24), Township twenty-nine " (29), South, Range twenty-three (23), East; there is a " traceable, but in places detached channel, (shown on " the annexed map, and thereon designated as Buena " Vista Slough), of varying width and depth."

This brings us to the consideration of the question: Is this finding that Buena Vista Slough is "correctly and fully shown and delineated on exhibit A," in so far as it shows two breaks in the channel of such slough, one on Section 14, and one on Section 15, T. 30 S., R. 24 E., sustained by the evidence?

We claim that it is not, but on the contrary, that every witness, whether called by plaintiff or defendant, who testified in this case in relation to the condition of Buena Vista Slough from Buena Vista Lake to Section

24, T. 29 S., R. 23 E. (the Bonestell House), testified that there was a continuous channel all the distance between those two points. And we claim if this be so, that, as the channel, before it reached Section 24, ran through two sections of plaintiff's land, Sections 10 and 5, in T. 30 S., R. 24 E., judgment should have been given for plaintiff, even if the channel terminated at Section 24.

We have also all the maps and diagrams that were offered in evidence by plaintiffs and defendant, upon which were shown the south end of this body of swamp and overflowed land, showing a continuous channel through several sections of plaintiff's lands.

We will first call attention of the Court, to the documentary evidence, showing Buena Vista Slough, to be a continuous channel or watercourse, running from Buena Vista Lake to the Bonestell House, on Section 24, T. 29 S., R. 23 E., through the lands of plaintiffs described in the amended complaint.

First. Map "B," made by F. P. McCray in 1878, for the Kern Valley Water Company, from a survey made for that Company in the years 1877–8, or from one to two years before this suit was commenced. This map shows Buena Vista Slough to be a continuous watercourse, from the point where Kern River enters Buena Vista Slough to and into Sec. 24, T. 29 S., R. 23 E., and running through Sections 5 and 10 in T. 30 S., R. 24E., described in the amended complaint. McCray says this slough was located from a meander survey made by him in 1877–8.

Second. Map "2," made by Mr. McCray, but for plaintiffs in this case, and just prior to the trial showing channels of Buena Vista Slough from a point where Kern River enters Buena Vista Slough to the line

between Townships 27 and 28 south. This map, Mr. McCray says, was made by copying map "B," so far as the slough was located on that map, and that the balance of the slough was located in the field, and placed on the map in April, 1881.

Third. Map "I," made from the surveys of Macmurdo and James, two civil engineers who made a meander survey of this slough for defendants in 1879–80. This map both Macmurdo and James swear is correct, and they swear that Buena Vista Slough is correctly laid down on it. This map is a complete duplicate of map "B," made by McCray in 1878, so far as the location of Buena Vista Slough is concerned.

Fourth. Map "H," also made from meander surveys of Macmurdo and James, showing the channel of Buena Vista Slough to the north line of Section 15, T. 30 S., R. 24 E., a duplicate of maps "B" and "I," so far as it extends.

All of the surveys from which these maps were made, were made with a view of locating the channel of Buena Vista Slough and platting it on a map. As Macmurdo says: "*to find and lay down correctly on the map any chan-*
"*nel that there might be through that body of swamp land.*" (T., IV, fol. 1077.)

Fifth. Exhibits 8 and 15, certified copies of Government plats of Townships 30 S., R. 25 E., and 31 S., R. 25 E., showing Buena Vista Slough to be a continuous watercourse from Buena Vista Lake to the N. W. cor. Sec. 30, T. 30 S., R. 25 E., or the line of swamp land where the Government survey of the line of the slough stopped, and giving its size where it crossed township and range lines, and also in most cases where it crosses section lines, showing a stream ~~for~~ from 3.18 chains to 4.90 chains wide, and running northwest.

These plats are accompanied by field notes, Exhibits 20 and 21, made by the United States Deputy Surveyor in September, 1854, when this land was surveyed.

Although this survey was made at a season of the year when Kern River would be carrying its minimum of water (September), on page 8 of Exhibit 20, we find "Lake Slough" given as 3.25 chains wide where it crossed the line between Sections 5 and 8, in Tp. 30 S., R. 25 E., and on p. 9, the slough is given as 4.90 chains wide, where it crosses between Sections 8 and 17. And under the head of "General Description," page 12, at the end of the field notes, the surveyor says: "Lake Slough, in most places, is very deep, "with a current of about one-half mile per hour."

In Exhibit 21, the field notes of Tp. 30 S., R. 25 E., Lake Slough is given as 110 links, course west, wide where it crosses the line between Secs. 3 and 4, as 3.18 chains where it crosses the line between Sections 31 and 32, course N.W., and where it crosses line between Sections 30 and 31, as three chains wide, course N. W.

If there were no other evidence in this case as to the existence of a continuous slough from Buena Vista Lake to Section 24, T. 30 S., R. 23 E., except these maps, made by these different surveyors, and in each case from meander surveys, this Court would reverse this case on the ground that the finding that adopted "Exhibit A" was contrary to the evidence.

But we are not required to rely upon these several surveys and maps, but have in their support the testimony of no less than four witnesses called by defendant, and at least fourteen witnesses called by plaintiffs, who testified to the fact that there is a continuous channel from Buena Vista Lake to Section 24, T. 29 S., R. 23 E.

The evidence as to Buena Vista Slough being well

defined and continuous so far north as the Bonestell House is clear and conclusive. In fact, on the trial of this case, the counsel made no attempt to prove to the contrary, the position that there are breaks in the channel at any point south of where Macmurdo and James ceased meandering it, is made for the first time in this Court.

We will now call attention to the testimony of the witnesses who testified to the fact that there was a continuous channel from Buena Vista Lake to Section 24, T. 29 S., R. 23 E.

Plaintiffs' witnesses who testified that there was a continuous slough or water channel from Buena Vista Lake to the Bonestell House, or Section 24, T. 29 S., R. 23, were eighteen in number.

James C. Crocker, one of the plaintiffs, who has resided in Kern County permanently since 1869, first came with cattle to the lands through which Buena Vista Slough runs, in 1854 (T., II, fol. 470), and again in 1855 (fol. 477); again in 1856 (fol. 479); again in 1868 (fol. 480); again in March, 1869, (fol. 486).

The witness then testified to being on Buena Vista Slough from 1869 to 1881, raising cattle, and as to the extent of his acquaintance with Buena Vista Slough from Buena Vista Lake to Tulare Lake, and the land through which it ran, as follows:

"Q—When did you again visit the slough? (after
" March, 1869).
" A—I could not tell you exactly when I visited it, but
" *I have been on that slough from that time up to the*
" *present time. I probably got back the same month. I*
" *was continually working after that time off and on. I*
" *have been there more or less the most of my time since,*
489 " *every year. I have been raising cattle and engaged in*
" *the stock business.*
" Q—Between what points have you ranged your cattle
" on that slough since 1879?

" A—Well, we have generally ranged them between the
" —in former years from the Buena Vista Lake they
" ran to Tulare Lake; and some scattering cattle even
" further north and further south than that. That was
" where we calculated to keep those cattle—within
" those bounds. I was here in the fall of 1869, and there
" was plenty of water in that fall then. There was water
" the whole length of the slough. The slough was full of
490 " water in the year 1870, whenever I went into the slough.
" I did not cross the slough in 1868 or 1870. In 1871 it
" was full of water. There was a great deal of water
" in it.
" Q—Was it running all the time?
" A—In 1871, oh, yes sir.
" Q—In 1871?
" A—Yes, sir; it was full of water.
" Q—What was the condition of that slough as regards
" there being running water down there, down to the year
" 1876?
491 " A—There was water there constantly until the year
" 1876.
" Q—All the time?
" A—Yes, sir; I never saw it without water running
" there.
" Q—You say during the year 1869—I understand you
" to say 1870, you never crossed that slough with your
" cattle?
" A—No, sir.
" Q—How about 1871?
" A—I think in 1871 we commenced working in the
" swamp. We were attracted in there by seeing cattle on
492 " the high points—cattle that had been surrounded by
" high water, and we commenced working in there to take
" them out. I was through the swamp considerably in
" that year, in 1871; also in 1872.
" Q—*What were you doing on the slough with your*
" *cattle from* 1872 *to* 1876?
" A—*We were raising cattle—working with cattle all of*
" *the time. When I first went there we estimated to have*
" *about* 1200 *head of cattle. That was in* 1869. *I could*
" *not tell how many I had in* 1876. *I had bought a great*
" *many and raised a great many. I could not make an*
" *estimate. We might have had* 10,000, *or might have*
493 " *had* 15,000; *I could not tell. I think we had at least*
" 10,000 *cattle. We were in those times taking cattle*
" *away, and bringing cattle there, during that time. I*
" *suppose we had about the same number during the*
" *years* 1873, 1874 *and* 1875 *as we had previously.*

" Q—*Were you running those cattle on this land in*
" *suit?*
" A—*Not all of them, but the greater portion of them.*
" We had some portion of the cattle that we had raised
" in the hills, and we used to take them down there, and
" drove them to the swamp; but they would not stay
" there. They would go back to their range, where they
494 " were accustomed to ranging.
" Q—*In working in that swamp, as you style it, Mr.*
" *Crocker, with your cattle, from the year* 1869 *to the*
" *year* 1876, *were you all through that swamp, and cross-*
" *ing the channels?*
" A—*Yes, sir; I think I have been on every acre in*
" *that swamp, from one end of it to the other, at dif-*
" *ferent stages of water. At high water, of course, I was*
" *not in so frequently.*
" Q—*In handling your cattle there, would you cross*
" *it from one side to the other.*
495 " A—*Yes, sir.*
" Q—How many years have you beeen accustomed to
" crossing Buena Vista Slough from one side to the
" other?
" A—I think we commenced crossing there in 1870 or
" 1871. I would not be positive. I think it was either
" 1870 or 1871 that I first commenced to cross the swamp.
" We did not go through the entire swamp. I think in
" 1871 we went clear across. In 1870 we did not go
" through the entire swamp. It was considered impos-
" sible to go through; but I have been crossing there ever
" since. I have crossed at all points most that there are
496 " on the map, with bunches of cattle, back and forth. In
" low stages of the water I have not been particular;
" crossed from one side to the other. In high stages we
" had certain places to cross.
" Q—In crossing that slough, as you say you have, at
" all times of water, haven't you ascertained where the
" channel that runs down through there is located?
" A—Very near. I could not tell it by survey; I know
" by the general lay of the country where it is, from one
" end of the swamp to the other.

T., II, fols. 488–496.

" Q—At how many different points do you suppose you
" have crossed that slough between the extreme north
" line of your land and the south line, near Buena Vista
" Lake?
" A—*I suppose I have crossed it on every section that*

"*there is bordering on the slough; perhaps every half*
"*mile.*"

T., II, fol. 504.

After testifying generally as to the channels of Buena Vista Slough, from Buena Vista Lake to Tulare Lake, he is examined as to the slough or channel from Buena Vista Lake to Bonestell's.

"Q—Mr. Crocker, have you ever been through and
"along Buena Vista Slough when there was no water
"running in the channels at all?
" A—Yes, sir.
" Q—*What was the condition of the channel of Buena*
"*Vista Slough from where it leaves Buena Vista Lake?*
" A—*Well, I should have to describe it by sections.*
" Q—*Describe it by sections.*
" A—*Buena Vista Slough, from where it leaves Buena*
516 "*Vista Lake north, to within half a mile of where New*
"*River runs into Buena Vista Slough, or where it did*
"*when I was last there, is a very deep slough, the same*
"*as it was when I first saw it; a very deep slough, but*
"*not so much water in it. When you get within about*
"*half a mile of the mouth of New River, where it enters*
"*the slough, it is different there for a distance of two or*
"*three miles from what it was when I first knew it. It*
"*is filled up with sediment and sand; grown up with*
"*willows. When we first saw it there was no timber on*
"*it.* When you get still north of that point, the slough
"becomes more as it was in former years, wide and deep.
517 " Q—*How far does that continue?*
" A—*It continues* (referring to map 2), *I should think*
"*from the general lay of the country, not from any actual*
"*survey—I should think there was a deep slough there*
"*for about eight or nine miles below where New River*
"*enters Buena Vista Slough, then it branches. That is*
"*the point where it reaches Weed Island and branches.*
" Q—*What is the condition of the slough below that?*
" A—*It is not so deep. It is a well-defined channel in*
"*the centre of Weed Island, except in one place; that is*
"*at the extreme south end of Weed Island; there the*
"*banks are low, cut out considerably on each side.*
518 " Q—*How far does that extend?*
" A—*It is a very short distance. I presume it may be*
"*twenty, thirty, or fifty yards; I could not say.*
" Q—*What caused that to be in that condition, if you*
"*know?*

" A—*When I first found that country in there, the first* " *time I went in there, there was a large drift of timber,* " *logs and rubbish of all kinds, and it had blocked the* " *slough up.* The current striking against that drift had " forced the water out on each side of the slough, and " forced the water off into the channels on both sides of " the swamp, and a portion of the water ran down
519 " through the centre slough. Considerable water went " through, but it was locked up from where the drift " piled was lodged in there for some distance down; it " formed a kind of turf, or sod and tules, and it was very " boggy, so that it was impossible to cross it. That was " north of the timber.

" Q—*What was the condition of the sloughs as you* " *saw them, with no water in them north from Weed* " *Island?*

" A—*The sloughs on both sides you have reference to,* " *on either side?*

520 " Q—*Take the main Buena Vista Slough first. What* " *was the condition of that?*

" A—*When there is no water in it, it is in places a* " *prominent slough; prominent steep banks on both* " *sides; at other places sloping banks; in other places it* " *extends out over wide ground, with a depression run-* " *ning through, and the ground rising on each side.*

" Q—*Is that a marked channel that you can follow* " *through there?*

A—*Yes, sir.*" T., II, fol. 515–520.

On cross-examination he testified to being on the Buena Vista Slough lands, with his stock, from 1869 to 1880.

T., II, fol. 543 to 561.

He is then questioned as to the slough or channel from Wible's Headquarters down to Section 24, or the Bonestell House.

" Q—How deep are the banks of Buena Vista Slough " from Wible's crossing down to Weed Island?

" A—Well, very deep from Wible's Camp down to " Weed Island. I think it will average in the neighbor- " hood of 15 feet.

" Q—*Is that a continuous slough or channel from* " *Wible's Camp down to Weed Island?*

" A—*No, sir, not quite to Weed Island.*

576 " Q—*How far from Wible's Camp does a continuous*
" *and well defined slough extend north?*
" A—*I think about* 3 *or* 4—3 *miles.*
" Q—*What is the depth and height of the sides of the*
" *slough during those* 3 *miles?*
" A—*Well, that is the deepest portion I speak of, I*
" *should judge from Wible's Camp down there three miles*
" *—I should judge the deepest of it in the deep holes,*
" *taking it along there, in my judgment, would average*
" *about* 15 *feet. It may not be so deep. That would be*
" *my opinion.* I could not tell what the highest place
577 " would be. I never measured it. I can only recollect
" from the surface down to the water. I have never seen
" it entirely dry there in my life. It is not dry there
" now.
" Q—From Wible's Camp down the slough?
" A—No, sir.
" Q—Where does the water come from?
" A—I suppose it went down the river, some of it. In
" the dry seasons it soaks in. At the present moment I
" think it goes down the river. I have not been there
" for a month.
578 " Q—How does it get into the slough below Wible's?
" A—It goes through the headgate. It did. I have
" not been there for months. I cannot tell you how it is
" now. I don't know whether that headgate is shut or
" not. That headgate is on the levee before you get
" about 300 or 400 or 200 yards, perhaps, this side of the
" headquarters house.
" (The witness's attention is called to map No. 2.)
" The headgate is some 20 or 30 or perhaps 50 feet from
" where the levee crosses the old slough. It is not a
" greater distance than that.
" Q—Is there a headgate within 50 feet of the old
" slough where it crosses the levee?
579 " A—Yes, sir. I mean a gate to allow the water to
" flow through the levee.
" Q—Then there is a headgate within 50 feet of where
" the levee crosses the old slough, so constructed that the
" water coming down the old slough can be continued
" along north in the slough without going into the canal
" at all?
" A—Yes, sir; I don't know whether all of the water
" has been flowing down the canal within the last month
" or not; I have not been down there within the last
580 " month; I have never seen the slough just below Wible's
" entirely dry—north, I mean; I have seen it dried down

" into little holes of water; lagoons; I was down there the
" last of November.
" Q—Wasn't there any time when there was not any
" water in the slough below the levee and below the canal?
" A—No.
" Q—Was there no time, to your knowledge, when the
" canal took all the water in the slough and left none to go
" down the old slough below it?
" A—No, sir.
" Q—There never has been a time?
581 " A—No, sir; the canal has taken some of it; and at
" times, I judge, has taken the most of it; I have seen the
" time when the slough below the levee was nearly dry; I
" have seen it so that the water was cut off entirely; only
" left in holes.
" Q—Then you have seen it when there was no water
" running through the slough there where it crosses the
" canal?
" A—Yes, sir; none in the canal, either, at that time.
" The slough would be then dry below the canal, except
" in holes.
582 " Q—How deep were the banks—the deepest there?
" That is what we started to get at—along there from that
" point down to Weed Island?
" A—I belive there are places there where it would be
" from the bottom to the surface, 20 feet.
" Q—For that distance of three miles, where you say it
" is well defined, what is the shallowest bank in the whole
" slough in that three miles?
" A—I should think it was 30 or 40 feet.
" Q—I speak of the height of the banks, not the widths.
" A—No; I think it runs out as you go towards it; the
" nearer you get to Weed Island the shallower the banks
" get.
583 " Q—You told me there was a well-defined channel
" there from Wible's for three miles?
" A—Yes, sir; and the banks in the deepest are 15 or
" 20 feet deep.
" Q—At the shallowest, how deep is the channel?
" A—I should judge probably 8 or ten feet; and promi-
" nent for that distance. Then, probably, as you go north,
" it runs out.
" Q—To nothing?
" A—No, sir; not entirely to nothing.
584 " Q—What is the depth of it at the end of that three
" miles; the depth in the channel?
" A—It is more of a depression than of a channel where
"

"I spoke yesterday of the drift-wood blocking it up.
"There is no drift-wood there now.
"Q—There is no channel to the end of that 3 miles,
"going north?
"A—Yes, there is a channel; there is a channel that is
"cut out on both sides of the slough.
"Q—Cut out; has it any banks?
"A—Yes, sir.
"Q—How wide apart?
"A—I could not tell how wide they are.
585 "Q—How far apart are the two banks of that channel,
"if it has any banks?
"A—It is cut out in places.
"Q—I am speaking of the bottom of that three miles
"in the Old Slough that runs down you say three miles,
"and is a well-defined slough with high banks. At the
"end of that where it ceases to be well-defined, how wide
"is the distance between the banks, if it has banks, be-
"low that?
"A—I should suppose it to be—the slough is wider
"after you get right to this low place where the water
586 "breaks out; the slough is wider than it is this way.
"Q—How wide is it after you get three miles down
"and leave the well-defined banks?
"A—That is the place I am speaking about.
"Q—How wide does it get at the widest?
"A—It branches into three sloughs; one runs on each
"side.
"Q—Are there three well-defined sloughs there?
"A—In portions of the way there are; in some por-
"tions.
"Q—Immediately after you leave the point where the
587 "well-defined slough ceases, do you come to the three
"sloughs that are stated on this map No. 2? Show me
"where it ceases to be a well-defined slough on there.
"A—I should think it would be somewhere here (point-
"ing on map). It would be somewhere on Sec. 32, I
"think. Let me see, I said about three miles from the
"canal camp. It would be somewhat about here (point-
"ing).
"Q—Wherever it is, it goes down until it ceases to
"have well-defined banks to it?
"A—Yes, sir.
588 "Q—Now, at that point just below that point, how
"wide is it between the two banks, if there are any
"banks?
"A—There it is more of a depression on both sides
"where the water has cut it.

" Q—It is more of a depression in the ground than a
" channel cut through the ground? Is that so?
" A—Yes, sir.
" Q—Well, it has no banks to it, then?
" A—In places it has.
" Q—In places it has not?
" A—In places it has sloping banks.
589 " Q—It has no banks; just a depression in the ground?
" A—No perpendicular banks.
" Q—No banks of any kind, has it?
" A—It has in places.
" Q—There are places where there is no bank at all?
" A—Yes, sir.
" Q—There are places where there is a sloping bank on
" each side, and places where there is a very well defined
" bank cut right down by the action of the water?
" A—Yes, sir.
" Q—10 or 20 feet high?
" A—Yes, sir.
590 " Q—Then there are other places where there is no
" bank?
" A—No perpendicular banks.
" Q—No bank of any kind?
" A—Yes, sir.
" Q—How wide apart are those banks?
" A—In these places pretty wide.
" Q—How wide?
" A—50 or 75 feet.
" Q—In some places 200?
" A—Probably. Yes, sir.
" Q—Some places a quarter of a mile?
" A—Not at that point.
591 " Q—Are there some places along the whole course of
" the slough where you find the banks a half a mile or a
" quarter of a mile apart?
" A—I could not say. In high water sometimes.
" Q—From one bank of the channel to the other, at the
" widest, is there a place where there it is half a mile?
" A—There is a place where the water goes down and
" flows out over the banks of the slough; and it flows
" back that depth, I think, at high stages of water; and
" at low stages of water it does not.
" Q—*Isn't there a well defined channel all of the way*
592 " *from Buena Vista Lake to Tulare Lake?*
" A—*A channel that carries water, there is.*
" Q—*Is there any one continuous, distinct, defined*
" *channel from Buena Vista Lake to Tulare Lake through*
" *there?*

" A—*I think there is. I am positive of it.*
" Q—*Have you followed it up all the way?*
" A—*I have been over it.*
" Q—*Every foot of it?*
" A—*I would not say over every foot of it. I have*
" *been over every quarter section of it.*
593 " Q—*You have never seen that channel that water was*
" *not running in it?*
" A—*Yes, sir; I have seen it when water was not run-*
" *ning in it many times.*
" Q—*How often?*
" A—*I could not tell you how often.*
" Q—*When was the first time you did that; no water*
" *running in it?*
" A—*In* 1871."

T., II, fol. 575–593.

" Q—*Is that one continuous slough or channel all of the*
" *way from Weed Island down to Tulare Lake?*
596 " A—*Yes, sir.*
" Q—*Are there many of them?*
" A—*There are more than one.*
" Q—*How many distinct channels are there from*
" *Wible's down to Tulare Lake?*
" A—*There are two that I consider prominent water*
" *channels that go through.*
" Q—*Are there two continuous water channels running*
" *all of the way from Wible's down to Tulare Lake*
" *through that swamp?*
" A—*No, sir. There is one running down to Weed*
597 " *Island—only one channel, until you get to the head of*
" *Weed Island?*
" Q—*From Wible's to the head of Weed Island there*
" *is only one channel or watercourse through the whole*
" *swamp, the whole width of it?*
" A—*At a low stage of water.*
" Q—*At a high stage of water, how is it?*
" A—*It will spread out and go through other sloughs.*
" Q—*How many channels are there besides this one*
" *you speak of from Wible's down to Weed Island?*
" A—*I don't know of any regular channels. There is*
" *places where there is depressions—no regular slough.*
" Q—*Why isn't it as much a regular channel as the*
598 " *channel from the place where the permanent banks*
" *cease, down to Weed Island?*
" A—*Well, I mean water goes down through the*
" *slough, it being the larger slough?*

" Q—Are there not other channels, from Wible's to the
" head of Weed Island, just as distinct when there is
" any water there; that gave as much the appearence of
" a watercourse, when dry, as the one which you have
" spoken?
" A—I think not. I think they differ—not having a
" current?
" Q—I am speaking of the appearance they present
599 " when the water is all off and they are absolutely dry?
" A—On the east side of that slough, from Wible's
" Camp down between that and the mainland, there are
" depressions in the ground, like sloughs, cut out.
" Q—Wherein does not that, when the water is all
" gone, present just the same characteristics of a water-
" course as the one you call the main slough?
" A—There where the water breaks out, the water
" that runs down there generally comes in and stands
" between the levee and what we term the head of Weed
600 " Island on the east. It stands in that country. I have
" never seen it with a current there, as there is through
" the head of Weed Island. *In going from Wible's down*
" *to Weed Island, when the water is taken off there, and*
" *the country is perfectly dry, I only found one channel*
" *from Wible's down to Weed Island. That is, to where*
" *it widens out. That I guess is about three miles.*
" Q—*There it has a perfect channel, with well-defined*
" *banks, and rather narrow?*
" A—*Yes, sir.*
601 " Q—*From that point down to Weed Island, how many*
" *channels are there?*
" A—*From this point where it breaks out?*
" Q—*Yes.*
" A—There are three.
" Q—Where are they on the map?
" A—I cannot tell where they are on the map—on this
" or any other. I only know from knowing the country.
" I presume that this western channel on this map refers
" to one of them, and that the middle one represents one;
" and the water breaks here and goes over on this line
" [showing.]
" Q—From that down to Weed Island, how many chan-
" nels are there?
" A—From this point where it breaks out?
602 " Q—Yes.
" A—There are three.
" Q—Where are they on the map?
" A—I could not tell you exactly on this map, or any
" other. I only know from knowing the country.

" Q—Does this represent one of them on the west?
" A—I presume that represents one.
" Q—And that the middle one?
" A—Yes, sir.
" Q—Then there is another over here?
" A—The water breaks here, and goes over this line
603 " [showing.]
" Q—*From that point, which is just three miles below*
" *Wible's, down to Weed Island, you find three chan-*
" *nels in the swamp land?*
" A—*Yes, sir.*
" Q—*Wherein do they differ from each other, if at all?*
" *Mark you, I am speaking of when they are dry.*
" A—*I don't know that they differ materially—the*
" *three. Two of them do. The centre channel has got*
" *more prominent banks than those on the two sides.*
" Q—The centre one has not any banks at all, has it?
604 " A—Yes, sir.
" Q—How wide are those banks apart again?
" A—That is the bank below this break?
" Q—Yes, sir, I am talking about after you got below
" the break, it has no banks?
" A—Yes, sir; it has banks in places, and deep.
" Q—How wide are these banks, how wide apart?
" A—I presume they are very nearly as wide as the
" slough. They are not half a mile apart, nor a quarter.
" Q—Wherein does that channel below the point where
605 " it is well defined, as you say, differ from this western
" channel?
" A—It differs because in portions of the way, this has
" cut through and formed a regular bank. I speak of the
" western one?
" Q—Then the western channel is well defined and
" looks more like a watercourse than the middle channel?
" A—No, sir. It carries more water than the middle
" one, because the middle one was shut up with the drift
" wood, which turned the water out of it at one time. I
" think the water will run into this western channel be-
" fore it will run in the middle one."

T., II, fol. 595-605.

" Q—From Wible's down to the head of this Weed
" Island, is there any growth of tules in what is marked as
" the channel on the map?
" A—No, sir; none at all.
" Q—In the swamp land that is marked as swamp land
" on the map outside of the channel, is it all covered with
" tules?

645 " A—In places where the water channel is; in places
" there are tules, and in other places not. By the channel
" I mean where the main current of water goes.
" Q—I am speaking of the slough, from Wible's down
" to the head of Weed Island?
" A—In the main slough, in the centre of the slough.
" Q—In the centre of the slough you told me there was
" no growth of tules?
" A—Not in the centre.
" Q—Is there any in this slough to the west?
" A—There is none until you get to where this timber
" was lodged. From there down there is tules growing in
" that place, right in the channel of the slough.
646 " Q—That is the place where you speak of where the
" banks are not so prominent and well defined, but they
" slope out?
" A—Yes, sir; somewhat. That has been filled up. I
" presume the main slough was filled up by this freshet
" lodging timber in it. It is what we call boggy—a quag-
" mire; you cannot go across it."

T., II, fol. 644–6.

"Q—In speaking of a lot of drift wood that you found
" at one time at the south end of Weed Island, when was
711 " it that you went down there and found that drift wood?
" A—I think 1871 was the first time I saw it. It was
" after the flood of 1868; in 1871. I think I may be
" mistaken as to the year. It might have been 1872. I
" was on Weed Island, I am positive, in 1871. But
" whether I went to the drift wood in 1871, I cannot say;
" but somewhere about that time. At any rate it was
" after the flood.
" Q—*What was the character of that drift wood you*
" *found there?*
712 " A—*Well, it was logs; broken logs; some of them* 40
" *or* 50 *feet long, perhaps longer; and some of them were*
" *two feet through. They lodged in the slough on the*
" *point of that island.*
" Q—*And caused the slouyh to divide around each*
" *side?*
" A—*I attributed it to that, as the slough was stopped*
" *and no chance for a regular current to go through.*
" There was some water going through this timber, and
" still going on down this slough, which kept the slough
" tolerably full of water, but the current of the water was
" stopped.
" Q—But afterward, later than that, did the driftwood
" disappear?

713 " A—Yes, sir.
" Q—After the driftwood disappeared, what change
" did it make in the channel that ran through Weed
" Island; the centre channel?
" A—The channel was filled up a great deal with tules
" and a kind of sod grown over it.
" Q—Well, did the water, after the removal of that
" obstruction, course through that channel?
" A—Yes, sir. That timber we found there came down
" from the mountains, I presume. It was pine, and some
" kind of cedar. I have used the wood and cut it; per-
714 " haps other kinds of timber; and I know there was
" some redwood."

T., II, fol. 711–714.

"
" Q—*Have you ever been on Buena Vista Slough, at*
" *any point, in a ferry boat?*
" A—*Yes, sir; at Tracy's Crossing; I think I put it*
" *there, but I won't be positive, in* 1871; *the boat that I*
" *made was made of plank* 17 *feet long,* 2 *feet wide and*
" 2 *inches thick. The boat was* 8 *feet wide, or about*
" *that. We used it for crossing the slough, for crossing*
" *our wagons on.*
731 " Q—*What became of that boat?*
" A—*It was taken off down the slough.*
" Q—*Did you ever see it afterwards?*
" A—*I did.*
" Q—*Where did you find it?*
" A—*I found it near the head of Weed Island.*
" Q—*How far from where you had been using it form-*
" *erly?*
" A—*I suppose it was five miles or such a matter.*"

T., II, fol. 730–1.

S. W. WIBLE, Superintendent of the Kern Valley Water Company, who had lived on Buena Vista Slough on Sec. 15, T. 30 S., R. 24 E., at what was known as Wible's Headquarters, since the fall of 1876 (T., II, fol. 1749–50), a witness whose business had kept him employed along and crossing Buena Vista Slough, and watching the flow of water down the slough ever since 1875, testified as follows:

1761 " "Q—How many points below Bonestell's had you
" crossed the channel?

" A—At a great many places.
" Q—About how many?
" A—Well, do you include the whole distance, or be-
" tween any particular points.
" Q—I say below Bonestell's house at how many differ-
" ent points have you crossed?
" A—Well, I have my camp down there, and crossed it,
" and crossed it so often, that it is impossible for me to
" tell.
" Q—In making those crossings, would you make them
" at one place, or at some other places?
1762 " A—I made two crossings there for the purpose of
" hauling freight from Delano. *I was last on the portion*
" *of Buena Vista Slough, south of the Bonestell House,*
" *only two days ago. I crossed at the Bonestell House.*
" *That was the 24th I believe, on Saturday last.*
" Q—*How wide was the channel where you crossed it*
" *at the Bonestell House?*
" A—*Well, it must have been 40 or 50 feet wide.*
" Q—*How deep was it?*
" A—*Well, it did not come right into the buggy bed,*
" *I should judge 3 feet or 3½ feet, probably. It might have*
1763 " *been a little deeper than that. It might have been a*
" *little less. I was there in a buggy.*
" Q—*After crossing the channel where did you go?*
" A—*From there I went up to headquarters, followed*
" *the channel right up, driving right along on the banks*
" *in most places. Once in a while would come into a*
" *bend and strike across.*
" Q—*Where you would drive across those bends at any*
" *time how long would it be that you would not see the*
" *channel?*
1764 " A—Oh, I could see the indications of it all the time,
" very little way from it.
" Q—What was the longest distance you were away
" from the channel so that you could not see it?
" A—Oh, it was about—I was often right close to it
" when weeds or something of that kind would hide it
" from me more than the distance really. Probably would
" be sometimes 100 yards. I could not tell exactly.
" Q—At what distance, the greatest distance would the
" channel be out of your sight as you drove along there?
" A—A very short distance going across these short
1765 " bends, probably 100 yards across a bend, might be 100
" yards from there into the bend. There was but very
" little channel but what I could see. In going from the

" Bonestell House on the channel to headquarters there
" might have been a quarter or a half a mile of the chan-
" nel that I did not see.
" Q—Did you find in driving out there any places and
" spots, and if so how many, where the water would over-
" flow the banks of the channel?
" A—There was but one place, or probably two places,
" where the water had run out a little. One place I ran
" around it and the other I went across it just a little bit.
" Q—How wide was it and at what point was it that
1766 " the water was running out that you crossed it?
" A—Well, it was just running out over the banks. I
" think I drove into it and then drove out again, just
" above Weed Island. There was one little place down
" on Weed Island where there was a high water chan-
" nel or something running out a little ways. I don't know
" how far, but a little ways, just barely run enough to
" wet your feet.
" Q—Was it 100 yards or half a mile in that middle
" channel, the first one you came to after leaving the
" Bonestell House?
1767 " A—The first that I crossed, I could not tell how far
" it ran; but it did not run far, for the reason that I
" afterwards ran around the end of it. It might have run
" out two or three hundred yards. Where I crossed it, a
" small stream probably six or eight inches deep.
" Q—Then you say you reached a point again at the
" head of Weed Island where the water was running out.
" How wide was it where it was running out at that point?
" A—Well, I didn't get right up to the slough. I did
" too—I went up to one side where it was running out.
" Then I went around it and came to where it was run-
1768 " ning out again. Whether it was all solid water running
" between that I could not tell.
" Q—How wide was it between those two points?
" A—Well, probably 200 or 300 feet, maybe 200 feet. I
" could not tell exactly. I drove around and across it. I
" was probably 100 yards from the slough when I crossed
" it.
" Q—How deep was the water at any point when you
" drove through there?
" A—Well, when I drove through it was just in the
" channel—the western channel there. It was just enter-
" ing that, and I suppose where I crossed, probably there
1769 " was a foot of water in there.
" Mr. Garber. Q—You mean at the western channel?
" A—Yes, sir; it was just entering into that.

"Mr. HOUGHTON. Q—Then the water that was running
"out of the slough, was that at the mouth of the western
"channel?
"A—That was at the mouth of the western channel.
"Q—After crossing that point did you find any more
"water running out of the slough over the banks?
"A—No, sir.
"Q—*How far did you say you went?*
1770 "A—*I went to headquarters.*
"Q—*What was the distance that you drove along the*
"*banks of the slough in that swamp, following the mean-*
"*derings of the slough?*
"A—*Well, I really don't know; probably* 12 *or* 14
"*miles.*
"Q—*What was the condition of the water in the*
"*slough?*
"A—*There was quite a body of water running in it there.*
"*Where we crossed it below, there was three feet and a*
"*half of water anyhow—running water.*
"Q—*What was the condition of the slough above as*
"*you approached the headquarter camp?*
1771 "A—*Well, it was deeper as you go up.*
"Q—*Then I understand you to say that you started*
"*from Bonestell's house?*
"A—*Yes, sir.*
"Q—*And followed the chaunel around to headquarters?*
"A—*Yes, sir.*
"Q—When were you last on the western channel of
"Buena Vista Slough?
"A—The same day when I crossed it—last Saturday.
"Mr. GARBER. Q—What channel was that?
1772 "A—The western; west of Weed Island. I crossed
"the west channel right where it leaves the slough, or
"close up there."

T., II, fols. 1760–1772.

The witness testified that the canal of the Kern Valley Water Company, constructed by him, is 24 miles long. That the difference in elevation between the head of the canal and the lower end is 37 feet, and that its lower end is 10 feet above the water line of Buena Vista Slough (T., II, fol. 1830–32), making a fall of 47 feet in 24 miles, or a fall little less than 2 feet per mile. And that the difference in elevation between the head of the canal and Tulare

Lake is 72½ feet, and the difference between Buena Vista Lake and Tulare Lake is 82 feet (T., II, fol. 1833–4), making the elevation between the head of the canal and Buena Vista Lake, 9½ feet.

On cross-examination he testified as follows:

"Mr. Garber. Now, Mr. Wible, I want to go along
" through this slough a little with you, and I hate to un-
" dertake the trip. When was it you said you had passed
" up and down the slough last—this channel?
" A—I passed up there last Saturday, the 24th of
" April.
" Q—Where did you go; where did you first strike it
" then?
" A—*I first came into the slough at Bonestell's place—*
" *Bonestell's house—in a buggy.*
" Q—How did you find the channel then at Bonestell's
1942 " house?
" A—Well, it was just—I don't think it ran into the
" bottom of the buggy—came up to it.
" Q—I spoke of the channel, not of the water. What
" sort of a channel was there, then?
" A—Well, I found that much water in it. A little of
" it came into the bottom of the buggy. That was right
" at Bonestell's house—on the east side of it.
" Q—Was the water running pretty fast there?
" A—Yes, sir. I could not tell how fast, probably a
" mile and a half or two miles an hour—probably three
" and a half feet of water in the channel. *I followed the*
" *channel from there right up to Headquarters. I think*
1943 " *it is nine miles, in a direct line, or ten miles. I think*
" *I followed it about twelve miles; that is, it is*
" *twelve miles, in the course of the channel, from*
" *Bonestell's house to headquarters, and on last Satur-*
" *day I followed it up that distance. I found water all*
" *the way.*
" Q—*How much water was running in that channel all*
" *that distance?*
" A—*Well, it was 3½ feet where I crossed it, and that*
1944 " *was the shallowest place that I know of,* and I know
" there were deeper places, because I had one ford above
" there that when the water is lower that I can cross, and
" I would not undertake it.
" Q—Well, where was that water coming from?
" A—It was coming from the gate—the head-gate that
" I speak of.

" Q—*Was it overflowing at any point during the dis-*
" *tance of twelve miles?*
" A—*There was one place where the water was just—*
" *where there was a high water channel where the water*
1945 " *had just run out. It was not overflowing the banks of*
" *the channel at any point in that distance.*
" Q—*There was none of that water running over the*
" *banks at any point from Bonestell's house up to head-*
" *quarters.*
" A—*No, sir. I drove right along. The water was*
" *just entering and had got a little ways out into the*
" *west channel at the head of Weed Island, and I fol-*
" *lowed.*
" Q—*Well, had it overflowed the banks of this channel*
" *at any point?*
" A—*No, sir.*
" Q—*Was it full? Was the channel full at any*
1946 " *point?*
" A—*The channel would hold a good deal more water.*
" Q—It was at no single point in that whole distance
" as full as it would hold without overflowing?
" A—That is in getting here, it began to go into those
" other channels that would lead off around and back
" into that.
" Q—*I understand you to say there was one continuous*
" *channel the whole distance?*
" A—*Yes, sir; one continuous channel.*
" Q—Well, there were branch channels to it?
" A—I could see little low places that would go out.
1947 " Q—What do you call these low places?
" A—Well, you might call them a depression or a
" slough. They are parts that break out at high water.
" Channels that break out. They would run into those
" places before they would overflow the banks.
" Q—*I understand you to say that during this distance*
" *of* 12 *miles, or for this distance of* 12 *miles, there was*
" *one continuous connected channel?*
" A—*Yes, sir.*
" Q—And the water running in it and not as much as
" it could hold without overflowing it?
1948 " A—Yes, sir. There was only one place that I crossed
" and there was a little this side—1½ miles this side of
" Bonestell's house, where there was one of those chan-
" nels, and the water had got into that. I drove
" right out from that. That was connected with
" the main channel. The water came out of the
" main channel into that. It intersected the main
"

" channel—it was a branch or fork of it. The way to
" explain that would be the main channel, then there is
" lower ground west of it; and once in a while in those
" little depressions, when the water got high, it would
" run there and run towards—
1949 " Q—Come here to this map and see if I can under-
" stand it.
" Witness goes to the map.
" Q—Where is this twelve miles on this map.
" A—*Section* 24, *Township* 29 *South, Range* 23 *East.*
" Q—*Is that Bonestell's house?*
" A—*Yes, sir.*
" Q—Now, that is twelve miles?
" A—Yes, sir.
" Q—Up to there?
" A—*Yes. sir. That is the twelve miles I traveled.*
" Q—*Now, in the course of that twelve miles from*
" *Bonestell's house up, the water was running down*
1950 " *in this channel, and at no place was it getting out of*
" *the bonks, or overflowing the banks.*
" A—*No, sir; I drove right along the edge of that*
" *bank, right at the edge of the slough.* There was,
" once in a while, when I came to cross there it was
" down in too far. It was narrow there. That was
" high ground, and there could no water possibly get
" out. By these other channels I speak of, I mean there
" was a little depression where the water had just got in.
" I think it was probably on Section 25.
" Q—Do you mean the ground was lower down in this
" direction—towards the west? When you speak of a
1951 " depression there, do you mean towards the west from
" the channel that the ground runs lower?
" A—Yes, sir. The water was standing in that de-
" pression. I don't think the water had got out there but a
" little ways. It was just shallow. The water was just
" standing in this depression. After it had gotten into
" that depression it would be 6 or 8 feet wide, and it
" might be 100 or 200 yards long; not more than that.
" Q—And in order to go into that depression, didn't it
" run from the bank of the channel there?
1952 " A—No, sir—oh, it raised up into that little depres-
" sion there.
" Q—And that was the lowest point in the channel
" there, I suppose?
" A—Yes, sir; in that twelve miles. I followed it
" until there was no water running over those banks at
" all. I came there and found the slough with water

" running in it. On Section 25 was the lowest place
" along there, and a little water had gotten into that de-
" pression outside of the channel.
" Q—Now, up here at 4, you say it had overflowed
" again?
1953 " A—There I just met the water. I drove right around
" there. When I came to that place I found the water
" had just got into that channel on Section 4, and I stood
" there and just seen it running. I could just see it.
" Q—Was it running over the bank there at Section 4?
" A—It was running in that channel.
" Q—That is another channel that makes out from this
" channel at that point?
" A—Yes, sir; the two channels are connected together
" on Section 4. It is three miles below Headquarters.
" If you go direct, it is 1½ miles below Headquarters. If
" you follow the course of the channel it is three or four
1954 " miles. I should think the water was running in this
" west channel, and had got down as far as the fence.
" That is the western channel. Didn't follow the channel
" down as far as Weed Island, but have crossed it in
" different places. I know about that channel. This
" west channel, where it runs through Sec. 4 and Sec. 9,
" is probably about two feet deep. That is a well-defined
" channel, that west channel; as a general thing all of
" the way from Section 4 clear down to Tulare Lake.

T., II., fol. 1941 to 1954.

" Q—*What is the greatest width of the water from*
" *Headquarters down to Bonestell's in that channel you*
" *speak of, the other channel?*
" *A—The middle channel; it is a channel, there is no*
" *middle about it. Well, there are probably places*
" *in that that are* 150 *feet wide. Such places must be on*
" *Section* 5, *I should think.*
" Q—*How are the banks on that channel on Section* 4*?*
" A—*They are high banks. The lowest or most sloping*
1957 " *banks of that channel are on Section* 5 *or Section* 4. *At*
" *that point the channel is* 100 *feet wide and the banks*
" *raised up.*
" Q—*Is it a well-defined channel there?*
" A—*Yes, sir.*
" Q—When it is dry, how can you tell it?
" A—You can always tell it when you come to it. There
" is some obstruction there, sometimes it is tules grow-
" ing in there, but I don't think there are any tules
" growing in there, and when the tules are burned out—

" these tules have all been burned out from the channel;
" it was just as well defined as you could mark it—de-
" fined because it has no tules in it.
1958 " Q—Is there any way to define it to recognize it ex-
" cept by the absence of tules?
" A—Yes, by the depression.
" Q—How can you tell when you come to the outside
" channel, except by the absence of tules?
" A—Well, when you come to the outside, it is bounded
" by tules.
" Q—Is there any other way you can tell when you get
" to the outside of it?
" A—The tules are right on the bank.
" Q—How can you tell by the absence or presence of
" tules, if you find them in the channel as well as out
1959 " of it?
" A—There are no tules growing in there at the pres-
" ent time, unless it should be a flag or something of that
" kind.
" Q—Whenever you come, at the present time, to this
" channel, or any of those channels that you designate as
" such, you would ascertain it, because there are no tules
" anywhere in it?
" A—There is not sufficient tules to obstruct the chan-
" nel.
1960 " Q—There are no tules in the channel, are there?
" A—There is probably just a few.
" Q—Well, there are not so many tules in the channel
" as there are out of it. Is that the way you tell it?
" A—Yes, sir. When you come to compare the two,
" there is no tules in the channel, and there are out of it.
" Whenever I found the channel, I found no tules in it.
" After making an examination of that 12 miles of the
" slough, I then went down to Dover's. It is on Section
" 1. It is marked on Map 2, and it is in Township 29
" S., R. 22 E."

T., II, fol. 1956–1960.

Milton Norton, plaintiff's witness, who had been familiar with Buena Vista Slough ever since the year 1875, and who had resided for 2 years on Buena Vista Slough at the very point where Exhibit "A," annexed to the findings, shows a break in the slough, and who had been raising hogs on Buena Vista Slough from August, 1878, to the time he testified, and running

them all along that slough from Wible's Headquarters to Bonestell's and three-quarters of a mile below, testified:

"*I reside on Buena Vista Slough,*
1669 "*about a mile and a quarter below Headquarter Camp,*
"*below the Wible Camp; it is on Section* 15, *Range* 30
"*South,* 24 *East. I have resided there for two years last*
"*fall; I am engaged in running hogs there, and in farm-*
"*ing, some; I am cultivating land there—a part of Sec-*
"*tion* 10, *in the same Township; I think it is the south-*
"*west quarter. I have been acquainted with the Buena*
"*Vista Slough since* 1875; I crossed it going backwards
"and forwards to the Templor Ranch; we used to cross
"it at the old Tracy crossing; I probably crossed it dur-
"ing 1875 three or four times during a month; I was on
"the slough in 1876, crossing backwards and forwards
1670 "going to the Templor. In 1876 we generally crossed at
"the old Tracy crossing; in 1877 I was in the swamp
"along Buena Vista Slough; I went there in 1876, I
"think.
" Q—June, 1877?
" A—Yes, sir. I first located about three miles above
"Dover's Camp, on the west side of the slough; I don't
"know what section that was I was on, but it was on
"what was called Smith's Pump; it was about three
"miles up the slough, and above Dover's.
" Q—At what time did you commence to pump there?
" A—Commenced pumping in June, 1877, I think, and
1671 "continued until March, 1878. I was attending to the
"pump and pulling cattle out of the mud-holes; that was
"about all.
" Q—*During the time you were there, between June,*
"1877, *and March,* 1878, *along what part of the slough*
"*were you going in pulling those cattle out?*
" A—*Well, we were from Wible's Camp; I think it is*
"*down about twenty miles.*
" Q—*At what point would that be on the slough?*
" A—*It would be below what is called the Fish Pond.*
1672 " Q—*How often, Mr. Norton, would you be along the*
"*slough during those months?*
" A—*Probably crossed them from one to ten times a*
"*day.*
" Q—*For how long?*
" A—*I think I was there nearly all the time; I had to*
"*go to all the different camps.* I was not on the slough
"for five or six months after March, 1878; *I went back in*

" *August in* 1878; *I then located where I am now living.*
" *My business since August,* 1878, *has been raising hogs*
" *and farming some.*
1673 " Q—*Where have you been running those hogs—be-*
" *tween what points on the slough?*
" A—*Well, they run from Wible's down to the lower*
" *end of Weed Island; the lower end of Weed Island is*
" *not very far; probably three-quarters of a mile below*
" *Bonestell's.*
" Q—*Do you know what was the condition of Buena*
" *Vista Slough between the place where it leaves Buena*
" *Vista Lake and the place where you have been running*
" *your hogs—three-quarters of a mile, or a mile below*
" *Bonestell's—when you first saw it?*
1674 " A—*When I first crossed it, the first time, it was dry,*
" *except in holes.*
" Q—*Well, what was the dimensions? What was the*
" *average width of that slough between those points,*
" *when you first saw it?*
" A—*I think it would average about* 125 *feet wide, and*
" *will average between* 12 *and* 15 *feet deep.*
" Q—*What kind of banks has it during that distance?*
" A—*Well, the banks for most of the distance are*
" *steep, and only at places you can cross.*
" Q—*How did you cross that slough between Bonestell's*
" *house and Tracy's Crossing, when you desired to cross*
" *it, when it was full of water?*
1675 " A—*When it is full of water, we generally have to*
" *swim it.*
" Q—*Well, is it an easy stream to cross, or difficult?*
" A—*No, sir; it is a very difficult stream to cross.*
" Q—***How near does that slough run to your house?***
" A—***It runs within 50 feet of the house.***
" Q—*It has been running there ever since you have*
" *been running at that point?*
" A—*Well, the water has not always been running.*
" Q—*The slough is there, there is no change in the bed*
" *of the slough at that point?*
" A—*No, sir.*
1676 " Q—*Does the slough run through the land that you are*
" *on there—the west half of Section* 10?
" A—*Yes, sir. I don't know as I can describe where it*
" *runs through Section* 10; *it crosses the southwest quar-*
" *ter and crosses the line. We built a fence on the line;*
" *it runs north and south, and we had to cross the slough*
" *several times; the slough also crosses the northwest*
" *quarter of Section* 10.

" Q—Have you ever seen that slough between Buena
" Vista Lake and the Bonestell House when it was all
" dry?
" A—I have seen it when it was, except in the water
1677 " holes; water holes don't dry up.
" Q—At such times how deep would it be down to the
" bed of the slough, or to the water from the bank?
" A—Well, it would be about, I think, six feet.
" Q—What depth of water would you have to put in
" that slough between those points, before it would over-
" flow its banks?
" A—I could not tell exactly; I would think—Do you
" mean when the slough is dry?
" Q—I mean how much water would you have to run
" above the bed of the slough, when it is dry, before the
" slough would overflow its banks?
" A—I could not tell exactly; I think about six feet,
1678 " though. I have been along the banks of that slough
" recently.
" Q—When?
" A—I was there along the slough last Thursday.
" Q—Where did you go on the slough first?
" A—I went on the slough first, about a mile from the
" adobe holes—below the adobe holes. From there I
" went northwest; followed the water down. We started
" from a little below the adobe holes.
" Q—I was speaking about the slough, Mr. Norton,
" that you have been testifying to between Buena Vista
1679 " Lake and Bonestell's House. Have you been on that
" part of the slough recently?
" A—Yes, sir. I was there on Thursday.
" Q—Where did you first strike the slough on Thurs-
" day?
" A—The first—
" Q—Between those places?
" A—Between the Bonestell House—we came up by
" the Bonestell House; struck it by the—
" Q—Did you strike it at the Bonestell House?
" A—Yes, sir.
1680 " Q—*After striking the slough at the Bonestell House,*
" *where did you go?*
" A—*We followed it up to where I live.*
" Q—*How far south, following the course of the slough*
" *from the Bonestell House, is it to where you live?*
" A—*I should judge it to be about 8 miles, following*
" *the slough.*
" Q—*Was there any water in the slough when you*
" *were following it?*

" A—*Yes, sir.*
" Q—*What was the condition of the water at that time?*
" A—*Well, it was running in the slough.*
" Q—*How much water was running in there at that*
" *time?*
1681 " A—*I think it was about three feet deep.*
" Q—*Was it overflowing its banks at any place?*
" A—*No, sir; I went along on horseback; I kept right*
" *along by the side of the slough all the time; I didn't*
" *cross it at all between the Bonestell House and the*
" *camp.*
" Q—Was that slough then the same, or about the
" same, as when you first saw it?
" A—*Yes, sir.*

T., II, fol. 1669 to 1681.

" Q—*Have you ever been on Buena Vista Slough at*
" *any time with a boat?*
" A—*Yes, sir.*
" Q—*Where?*
" A—*From Wible's Camp north on the slough, prob-*
" *ably three miles and a half, following the slough. I*
" *have been down that slough in a boat, probably three*
" *miles and a half from Wible's following the slough.*
1690 " Q—When the water was in the slough in February
" last, how far down did you go on the slough?
" A—Go down with a boat?
" Q—No, sir; how far did you go down the slough?
" You said you went down in February last, when the
" water was in it.
" A—I was down below Dover's.
" Q—When you followed down the slough between
" those points—between your house and Dover's—last
" February, what was the narrowest place where the
" water was running in the channel?
" A—I think the narrowest place must have been 50
" feet.
1691 " Q—Was it running at all points between your house
" and the point where you went?
" A—It might have been; there below the drift pile
" there were different channels, and it might have been
" narrower; but in two or three different channels, taking
" them altogether, there was no place less than 50 feet.
" Q—How wide was the widest channel where the div-
" ision took place?
" A—You mean there by the drift pile?
" Q—Yes; you say that the stream divided there,
" as I understand, and ran in two or three channels.

1692 " Mr. Garber. Where it divided, you mean; which was
" the widest of those channels, I suppose.
" A—Well, the west channel was the widest.
" Mr. Houghton—How wide would that be?
" A—I could not tell exactly how wide it would be.
" Q—About how wide?
" A—Probably that would be about 150 feet wide.
" Q—Did those channels come together again?
" A—It all came together, except one; there was one
" channel that runs down on the west side a considerable
" distance below; it may come in again below, but I don't
" know.
1693 " Q—How far was it below the drift pile that the other
" two channels came together?
" A—Probably a mile.
" Q—Have you ever been down that channel you
" refer to, running around the west side of Weed Island?
" A—I have been down—I have been on that channel
" below Dover's, and have been on it about Dover's, prob-
" ably from a quarter to a half a mile above Dover's; that
" is on the west channel; I have been on that channel
" when the water was running in it.
" Q—How deep and how wide was that channel, upon
" an average, from a point where it leaves the head of
1694 " Weed Island to Dover's?
" A—The channel on the west side?
" Q—Yes.
" A—Probably 125 feet wide in some places; some
" places more.
" Q—What depth of water will flow through there be-
" fore it will overflow its banks?
" A—*Well, I should judge the depth would have to be*
" *over three feet on an average.*
" * * * * * * * *
" A—I am working for myself.
" Q—How many places are there on the Buena Vista
" Slough, between the old Tracy crossing and Bonestell's
" house, that you can cross the slough when it is bank
1698 " full?
" A—Well, if we want to swim, we can cross most any
" place, except down below the drift pile there.
" Q—How many places are there, when it is bank full,
" that you can cross it without swimming?
" A—Well, sir, I think there would be one place prob-
" ably within a mile of the Bonestell House—a mile south.
" I have crossed the slough at the Bonestell House within
" a month.

1699 " Q—What was the condition of the water there when
" you crossed there?
" A—Well, the last time I crossed there, I don't think
" the water was running. I have crossed there this year
" when the water was running, and the water was between
" three and four feet deep, I should judge; that was in
" February and March.
" Q—At that time was the slough overflowing its
" banks?
" A—No, sir; not where we crossed.
" Q—Was it overflowing its banks at any point between
" where you crossed and the Headquarter Camp?
" A—Well, the slough when it gets high it runs out in
" different channels; when the slough gets about so high
1700 " it will run around in different channels and come back
" into the slough again; whether you call that—
" Q—What is that?
" A—I don't know whether you would call that branch
" of it the main slough. I would call it a separate slough.
" There are different places where the water gets to a
" certain height that those—
" Q—How high would the water have to get before it
" would flow out from the main slough into this side
" slough that you speak of?
" A—Between three and five feet, I guess.
1701 " Q—What would be the effect upon those separate or
" side sloughs when the water receded and became only
" two or three feet deep in the main slough?
" A—Those side sloughs; the water would run out of
" them into the main slough.
" Q—Then the beds of the side sloughs were higher
" than the bed of the main slough?
" A—Yes, sir; the main sloughs would drain out of the
" side sloughs.
"
"
" Cross-examination of
1702 "
" MILTON NORTON.
"
" By Mr. HAGGIN. Q—You say, Mr. Norton, that
" where this water divides it is how deep at the head of
" Weed Island?
" A—Do you mean how deep the slough would be, or
" how deep the water?
" Q—How deep the water would be at the head of
" Weed Island.
" Mr. MCALLISTER—You don't fix any date, Mr.
" Haggin.

" Mr. HAGGIN—There is only one date I know of, in
1703 " February last, or any date he has ever seen it divide
" there; I don't care what date.
" Mr. MCALLISTER—At any date, then?
" Mr. HAGGIN—At any date; when did you see it
" divide there?
" A—The highest; I could not tell exactly when I have
" seen it the highest.
" Q—I did not ask you the highest; I ask you when
" you saw it divide about the head of Weed Island?
" A—Well, that is a place we don't ride through; I
" would have to judge it from when the slough was dry.
1704 " I have seen the waters of the slough divide at the head
" of Weed Island; that is, not exactly at the head of
" Weed Island, it is above the head of Weed Island,
" probably a mile, in a southerly direction. That is
" what I call the drift pile; the water divides at the drift
" pile.
" Q—Before the water flows through the east or west
" branch, how deep is it in the main channel?
" A—Well, at the drift pile there is not much differ-
" ence in the depth of the channels; they are all about
" the same depth there.
" Q—Well, when the water comes down there it is just
" as apt to take one course as the other?
1705 " A—I think it is, at the drift pile.
" Q—And the main channel runs right through the
" drift pile?
" A—In that west channel the water has got to raise
" up before it runs out on the west side; the water has
" got to raise in the main channel before it will go
" through the west channel; I think it will have to raise
" from three to four feet before it will go into the west
" channel. I think the width of the mouth of the west
" channel is about 125 feet.

T., II, fol. 1689 to 1705.

Continuing his testimony as to the main channel to Bonestell's, he says:

" Q—You say you were down there last Thursday? In
" which one was the water running?
" A—It was running in both of them Thursday. It
1719 " was not running in the west channel at all on Thursday.
" Q—None in the west channel at all on Thursday?
" A—No, sir.
" Q—How was the water on Bonestell's place; was it
" confined to the channel, or not?

" A—It was there by the Bonestell place, yes, sir,
" there was no water running out on the west side at all.
" Q—Was the water running on the east side—was it
" all confined to those two channels, the centre and east
" channel; or what you call the north channel?
1720 " A—There may have been a little water running out
" of the slough.
" Q—Was there no water at all spread around over
" the country there at Bonestell's place?
" A—There was none on the west side. There may
" have been a little on the east side, right there at Bon-
" estell's. I was there, but I didn't cross the slough
" there; I didn't cross from Bonestell's to the east side of
" the swamp. In going from Bonestell's I followed right
" up the slough on the west side.
" Q—Then for aught you know, the east side may have
" been entirely under water?
" A—I have been there enough to know by the water
1721 " in the sloughs to know whether it runs out or not.
" Q—How was this middle channel compared to the
" east channel, or north channel as you call it? Is it as
" well defined as the north channel?
" A—You mean by the drift pile?
" Q—Yes, and from there on, take it first at the drift
" pile?
" A—The main channel is well defined, if that
" is the one you are talking about. I call the main
" channel the one that runs down by the Bonestell house;
" that is the middle channel. And there is a channel on
" the east side of the swamp and a channel on the west
1722 " side. I call the middle one the main channel. That
" is better defined than the eastern channel or the west-
" ern. The three channels come together at the drift
" pile. From the drift pile there are three channels.
" Q—They divide there. One runs to the east, one to
" the west, and one through the center. Am I correct?
" A—They come together again about a mile from
" there, except the west channel. There is a west chan-
" nel there when the water is high, that don't come in
" there again. They divide separate at the drift pile; I
1723 " could not tell you exactly how wide the middle channel
" is at that divide; probably 50 or 100 feet—may be
" more.
" Q—With perpendicular banks?
" A—No, sir; the bank is not perpendicular. Proba-
" bly in going 20 feet you would come to the bank from
" the bottom.

" Q—Well now, during your following that middle
" channel down below the Bonestell place, how far be-
" fore it ends?
" A—Well, I couldn't tell how far before it ends.
" Q—How far did you go down it?
" A—The water was running down about a mile below
1724 " Bonestell's place last Thursday. That is a little east
" or northeast of the end of Weed Island. It was very
" near the end—not far from it; I could not tell how far.
" It was very near the end of Weed Island. The water
" ended last Thursday very near abreast of where Weed
" Island runs down to a point. The Bonestell House is
" on Weed Island; the Bonestell House is between the
" main branch and the western channel.
" Q—Between the middle branch and the western
" channel, and this western channel in following it down
" last Thursday, you found the water had ended at about
1725 " the north end of Weed Island?
" A—The water in the middle channel. I said there
" was no water in the western channel at all.
" Q—You said in your direct examination, that within
" 20 feet of the end the water was so many feet wide and
" about one foot deep—how wide did you say it was?
" A—I think about 10 feet wide.
" Q—About 10 feet?
" A—Or 20, and coming back 100 feet further south-
" ward from where the water ended, it was about 75 feet
" wide.
" Q—Had the water of the eastern branch joined it
" yet; the water that came around to the east, had that
1726 " joined the centre?
" A—The eastern branch came into the centre branch
" at the south end of Weed Island.
" Q—Were the waters joining there—the waters of
" these two branches?
" A—They joined together about a mile below the
" drift pile.
" Q—They were then joined on Thursday, when you
" saw them?
" A—Yes, sir.
1727 " Q—There was no water in the western branch at all?
" A—No, sir; there was no water Thursday.
"
" RE-DIRECT EXAMINATION.
" By Mr. HOUGHTON—I should judge that the eastern
" channel and main channel ran in separate channels
" about a mile, and they came together three or four
" miles above Bonestell's.

" Q—You mean to say they separate and run apart
" about a mile, and then come together?
" A—Yes, sir. I am farming down there, as well as
" hog raising."

T., II, fol. 1719 to 1727.

F. M. Epperly, plaintiffs' witness, who lived on Buena Vista Slough at the Dover house, or camp, from May, 1871, to May, 1876 (T., II, fol. 2171), and in 1877 worked for plaintiffs at a camp three miles south of Dover's. (T., II, fol. 2176.) From 1878 to April, 1880, he was located near the Tule House. (T., II, fol. 2182–4.) Returned to the Dover camp in April, 1880, and has lived there ever since. (T., II, fol. 2184.) A witness who had, in short, lived on Buena Vista Slough all of the time from May, 1871, to the date he testified, with the exception of a few months, and had during all the time he was on the slough been engaged in running hogs until 1876, on his own account, and thereafter running pumps and attending to cattle for the plaintiffs.

This witness testified:

"Q—Have you ever been on Buena Vista Slough, south
" of the north end of Weed Island, that is, between the
" north end of Weed Island and Buena Vista Lake?
" A—Yes, sir. I have been there a number of times.
" Q—How many times?
2186 " A—Well, that I could not tell you. I could not tell
" you how many times I have been there. That is some-
" thing I could not answer, because it is hard for a man to
" recollect the number of times, traveling around there the
" way I was. I suppose I have been there fifty times, may
" be more. I have been to Tracy's crossing. I was along
" the slough there in 1872, hunting elk. I was on the
" slough at different points, traveling all up and down the
" slough. I was traveling up and down the slough on the
" west side of it, nearly the whole length of it there, be-
" tween those points.
" Q—What was the condition of the water in there
2187 " then?
" A—It was a good head of water in there at the time I
" was in there.

" Q—Was it confined to the channel or overflowing the
" channel?
" A—It was confined to the channel in most places. In
" some places—few places, it was running out. *It must*
" *have been in June or July*, 1872, *along about that time; I*
" *don't know exactly.*
" Q—*What was the condition of the slough at that time*
2188 " *between Tracy's crossing and the Bonestell House?*
" A—*Well, there was a channel, a perfect channel from*
" *the Bonestell House, below the Bonestell House, up to*
" *where you come to what is known as the drift, and there*
" *the water spread out some from the formation of this*
" *drift, made two or three different channels, and they all*
" *came back into the same one, with the exception of one*
" *that made out on the west side—that followed down on*
" *the west side of the swamp.*
" Q—*What was the condition of the channel above the*
" *drift?*
" A—*There was a well defined channel from there on*
2189 " *out.*
" Q—*How wide was that channel at that time?*
" A—*Well, that channel must have been—well, it was*
" *different widths; some places sixty to one hundred and*
" *twenty-five feet, may be one hundred and fifty.*
" Q—*Do you know how deep the water was in that*
" *channel?*
" A—*No, sir, I do not. The water was running in it,*
" *running north. I have never seen that channel when*
" *there was no water in it. I have seen that channel when*
" *there was no water running in it.*
" Q—*How deep was that channel?*
2190 " A—*Well, I think that that channel must be—I think*
" *it would average seven feet.*
" Q—What kind of banks has that channel down below
" as far as the Bonestell House?
" A—The most of the way down to the Bonestell House
" it has got banks. There are a few places that I could
" not cross well on account of the banks being straight
" up and down. I have crossed that channel when there
" was running water in it at the Bonestell House. I crossed
" it first at the Bonestell House in 1873, right up where
" the Bonestell House stands. There was water in it then.
" I rode across on horseback. It didn't quite run over my
2191 " my horse's back; was not quite deep enough to run over his
" back. I last crossed there, at that point, about a week
" or so ago. There was water running there then. It came
" up to my horse's side. I think the water must have been

" three feet and a half deep. The water was running at
" that time northward. I have also crossed that channel
" about a mile above the Bonestell House, south.
" Q—Is there a crossing at that point?
" A—We used to have a crossing there that we passed
" at. I first crossed it there in 1873, and it swam my horse.
2192 " I have crossed it there a number of times since. I could
" not say the number. I have not crossed there recently.
" I have not crossed that channel at any other point above
" the Bonestell House, except that until you get up above
" the head of Weed Island, but I have crossed it there.
" Q—What kind of a crossing was there there?
" A—Well, you cannot cross there in a high stage of
" water, but in a low stage you can cross there. It is very
" boggy and bad crossing. *I have crossed up where Mr.*
" *Norton's place is, Mr. Norton's ranch. I don't know what*
" *section that is on. When the water is low, there is a pretty*
" *good crossing, but when the slough is anything like full,*
2193 " *a man cannot cross it without swimming.* I have crossed
" it above there at the old Tracy crossing. I don't remem-
" ber crossing it between the two points.
" Q—Has there been any change in that channel since
" you first knew it, in 1873, to the present time?
" A—Not that I can see, any more than the drift pile.
" Q—What change has taken place at the drift pile?
" A—The wood that has drifted in there has been burned
" out and hauled out there, and left the channel more bare
" than it was when I went there. It has a better channel
" to pass through than it did when I first went there.
" Q—Where does the main channel run after it leaves
2194 " where the wood pile was?
" A—Well, it runs, I think, a little to the left of the drift
" pile, the main channel does—follows down. It runs
" through the island, going north.
" Q—You spoke of the west channel that leaves the
" main channel and runs westerly. Where does that chan-
" nel continue to?
" A—That runs down on the west side of the swamp,
" and empties into, comes into the slough.
" Q—How is the bed of that channel where it leaves the
" main channel?
" A—It is just a flat bed. It is a great deal higher; the
" bottom of it is a great deal higher than the bottom of the
" main channel. It is just a flat trough where it leaves the
2195 " main channel.
" Q—How high does the water have to be in the main
" channel before it can escape into the western channel?

" A—Well, I think there would have to be about three
" feet of water in the main channel; something near that.
" At the point where that leaves the west channel it is a
" kind of a flat basin of a channel. I guess it must be
" a hundred feet wide—fifty or a hundred; I am not posi-
2196 " tive. That channel runs off west, near where the drift
" pile was.
" Q—How far was the drift pile below the Dover
" House?
" A—It was above the Dover House. It is about a
" mile and a half north of the Norton House.
" Q—You say that it is a shallow channel where it leaves
" there. What is the nature of the channel after it leaves
" the main channel?
" A—Well, some places it remains a kind of wide basin;
" other places a well defined channel with banks to it.
" It continues on and it goes clear down into the main
" channel that runs into Tulare Lake. It joins the main
2197 " channel, if I recollect right, not far from the fish-pond.
" Q—How wide will that channel average, take it its
" entire length—I mean the channel that runs around to
" the west?
" A—That is a hard question for me to answer, because
" I could not tell the width that it would average. Some
" places it is a well defined channel, and in other places
" the water spreads out, may be fifty or one hundred
" feet wide. I think that channel would carry about two
" feet and a half of water without overflowing its banks.
" Q—If you should put two feet and a half of water in
2198 " that channel, what would then be the widest place?
" A—Well, put in two feet and a half, and there is
" places in it that would be one hundred yards wide. In
" other places it would come down to a narrow channel,
" where it would not be over thirty feet wide, may be
" forty feet.
" Q—Have you ever seen the water running in that
" channel from the point where it leaves the main slough
" to where it connects again with the main slough?
" A—Yes, sir.
" Q—Down at the fish hole?
2199 " A—Yes, sir.
" Q—How often?
" A—I saw the water coming down there in 1872, run-
" ning water there in 1872, 1873 and 1874. There was
" running water there all of the time. I was working at
" that time right along on that channel."
" T., II, fol. 2185 to 2199,

* * * * * *

" Q--You have referred to the drift in the main slough,
" a drift pile not far from Dover's, a mile and a half
" below?
" A—Below Norton's?
2230 " Q—Norton's. Did you ever see that drift pile?
" A—Yes, sir.
" Q—What did it consist of?
" A—Just a mass of timbers, different kinds of brush,
" and such like, drifted up into a heap.
" Q—Were there any logs there?
" A—There was logs in it. There must have been logs
" in it from a foot and a half to three feet through.
" Q—What kind of timber, do you know?
" A—Well, there was different kinds of timber; there
" was some willow, some pine, and some of this mountain
" cedar in there. I think there must have been logs there
" thirty or forty feet long, may be fifty feet long. I
2231 " never measured any of them, but I judge from the
" looks of them that there must have been logs there that
" length.

T., II., fol. 2229 to 2231.

"Q—*When were you last on that part of the channel*
" *that runs from headquarters, or Wible's Camp, down*
" *by Bonestell's?*
" A—*I was on that channel last Saturday.*
" Q—*How far did you follow that channel from head-*
" *quarters?*
" A—*I followed it from the Bonestell House up to*
" *Norton's Camp.*
" Q—*What is the condition of that channel between*
2241 " *these two points?*
" A—*Well, if I remember right, I didn't see but two*
" *or three places that was flowing over the banks any.*
" *There was some low places making out, that the water*
" *was breaking out into; one place very close to the drift*
" *where the water was running out. It was running out*
" *in that flat channel on the west side, in the western*
" *channel. I crossed the water there running into the west-*
" *ern channel. I don't suppose there was over ten inches in*
" *depth of water running out there, may be more. When*
" *I crossed there in the main channel I think there must*
" *have been about four feet, or very nearly it; I should*
2242 " *judge just from the appearance from the bank. I crossed*
" *the channel at the Bonestell House. At the Bonestell*
" *House there must have been four feet of water in the*
" *channel.* I didn't follow the channel below the Bones-

" stell House that day. *A little over a week ago I was on*
" *that channel below the Bonestell House.*
" Q—Did you at that time follow that channel at all
" below the Bonestell House?
" A—Yes, sir; I was down on the channel to the clump
" of willows, the Button Willows there. The water was
" running below the Bonestell House at the time I was
" there, I should think a mile. I didn't go right to the
2243 " end of the running water, but I was riding across it
" just above the end of it a little ways; I was at a point
" where I could see the end of the running water; it was
" passing along down the channel. I passed down the
" channel a little ways, and then rode back across it. *At*
" *that time I followed the channel from the Bonestell*
" *House up to headquarters. The water at that time was*
" *all confined to the channel; it was not overflowing the*
" *banks nowhere.*

T., II., fol. 2240 to 2243.

"
" On cross-examination, the witness testified:
"
" Q—*Did you ever follow the channel from Weed*
" *Island, all the way, every bit of it, to Wible's Camp?*
" A—*Yes, sir; I have been around the bank of the*
" *slough all the way through.*
2257 " Q—*You have been all along there?*
" A—*Yes, sir.*
" Q—*Was it the same channel all the way?*
" A—*With the exception of that drift pile, as far as I*
" *remember; I don't see any change from the first time I*
" *ever saw it to the present. The drift pile I speak of is*
" *above* [this should be *below* or *north*; see fols. 2258 and
" 2260, *supra*] *Norton's Camp about a mile and a half, I think;*
" *it is but a short distance from the south end of Weed*
" *Island;* I conldn't tell you exactly how far; I don't think
" it is over a mile; may be further; I never paid any par-
" ticular attention to the distance.
2258 " Q—How far is it from opposite to Norton's Camp on
" the slough to Weed Island?
" A—I could not tell you for the very reason that I
" never paid any particular attention to it.
" Q—Norton is on the south line of Section 10. How
" far is it from that point to Weed Island?
" A—I don't think it is over two miles and a half; I
" don't know, but I don't think it is; I think the drift pile
" is about a mile and a half below Norton's Camp; it may
" not be over a mile; I don't know what section Weed

" Island is on; I don't know nothing about those sections
" at all; I have never paid no attention to them.
2259 " Q—You think it is only about two miles from Nor-
" ton's to Weed Island?
" A—Yes, sir; I think it may be two miles and a half, and
" may be three; I don't know; I don't know anything about
" the distance except from riding over it; I don't think it
" is over three, but I don't know; I couldn't say as to
" that; I couldn't tell you how far it is from the south
" end of Weed Island to the drift pile, because I don't
" know; I never more than passed over the land; I should
" think it was not more than a mile and a half, may be not
" so far; I couldn't say, because I never saw it measured,
" aothing more than passed over it; I think the drift pile
2260 " is about a mile and a half to the northward of the Nor-
" ton house; it is all guess work with me; I never saw any
" of that ground measured; I don't know of but one place
" where there is a drift pile in the channel between Nor-
" ton's Camp and Weed Island; *I have traveled all up and*
" *down that channel in different directions, and I don't*
" *know of but one place; I couldn't say that I have trav-*
" *eled every foot of it; a man is not liable to step over*
" *every foot of it.*
" Q—*I mean, have you been on the margin of it all*
" *along?*
" A—*I have been on the margin of it all along, from*
2261 " *the Bonestell House to Norton's Camp; I have been on*
" *it as far up as Wible's Camp; I have seen it in holes.*

T., II, fol. 2256—2261.

" Q—Do you know any place at all, Mr. Epperly, from
" Wible's Camp to the Tule House, where you can cross
" that swamp land district without striking any channel
" at all?
" A—No, I don't without striking any channel at all;
" I know places where I can cross where the channel is
" small.

T., II, fol. 2266.

" I could not tell
" you how far down the water was running last Saturday;
" I was there at the Bonestell House, and there was
" water running there last Saturday; I was not any fur-
" ther down on it than there; was not down about Dover's
" hog camp, nor at Dover's hog camp.
" Q—Well, where did you see the water in the western
" channel, last Saturday, running?

2276 " A—Running out there close to the drift; I crossed it
" there at the drift, about a mile and a half from Norton's
" house, the only drift I know of; I was there sometime
" in the afternoon, last Saturday.
" Q—Where was the water coming from?
" A—It was coming out of Buena Vista Slough.
" Q—Where? At what point?
" A—It was running out, as I said a while ago, right
" below where that drift was running out in that side
" channel—that side channel that runs out there.
" Q—Well, did it first start out of its own motion, or
" was there any rise in the slough.
2277 " A—That I couldn't tell you, whether there was any
" rise; there must have been a rise from the time I was
" there before, because the time I was there before there
" was no water running out; there must have been some
" rise in the slough; I don't know how the water came to
" rise there; I don't know where it came from into this
" swamp land below the canal dam; I was not to Dover's
" house last Saturday; I was only on the channel at the
" Bonestell House, and from there started up to Norton's
" house, followed along up through Weed Island to Nor-
" ton's house; I only crossed.
2278 " Q—Right below the Norton House?
" A—Yes, sir; about the main slough."

T., II, fol. 2275 to 2278.

F. A. Tracy, a stock raiser on Buena Vista Slough from 1863 to 1878 (T., II, fol. 940), who first visited Buena Vista Slough in 1860, and who lived for several years at Buena Vista Slough near the crossing referred to as Tracy's crossing (T., II, fol. 917), testified:

"In 1863, in the fall, I next
919 " came to this country. I moved stock over here; cattle
" and horses. I stopped on Buena Vista Slough about 30
" miles from Buena Vista Lake—30 or 35 miles; about six
" miles from Tulare Lake. I was on the west side of the
" slough and camped there. I remained at that camp
" about a month, I presume, with stock. That must
" have been in October, I think, although I am not posi-
" tive. It was about that time. After staying there a
" month, I went up about 7 or 8 miles further up, south.
" *I remained at that point during the winter of* 1863 *and*
" '64; *and from there I moved up to my camp on Buena*
" *Vista Slough, further up, about three or four miles*

920 "*from Buena Vista Lake, northwest. My camp was on*
"*the east side of Buena Vista Slough. I must have*
"*reached the camp on Buena Vista Slough about the*
"*middle of the summer of* 1864. *It was about this*
"*time before I got established there.*
" Q—Then, were you all of the time between October,
" 1863, and the time you reached this camp in the middle
" of the summer of 1864, along the slough?
" A—Yes, sir; between the point where I first struck
" it and the camp; and with my stock.
" Q—What was the condition of the water in the slough
" when you struck it?
921 " A—When I struck it in 1863, I camped at a hole of
" water about a mile and a half long, and I camped there
" about a month.
" Mr. Houghton. Q—Then I understand you to say
" you moved up 7 or 8 miles. How long did you camp
" at that place?
" A—I camped until the next spring. I don't remem-
" ber the number of months. That would be the spring
" of 1864.
" Q—What was the condition of the water in the
" slough between the time you reached there and when
" you left the next spring?
922 " A—The water during that spring ran down and filled
" up the slough. It ran clear through, I think, to the
" lake. I am not positive. I did not follow it clear
" down to the lake. *I think I must have left that place*
" *in June, although I am not positive when I did leave;*
" *June,* 1864. *I went from there directly to my camp*
" *on the east side of the slough.*
" Q—When you were on the slough at the lower place,
" 6 miles, I understand you to say from the lake, were
" you feeding your cattle along the slough?
" A—Yes, sir. I was crossing to and fro, from time
" to time, over this slough and through the swamp lands
923 " there. And also when I was in camp 7 or 8 miles fur-
" ther south of that point. *I had my stock on the swamp*
" *land there.* I think the latter part of 1863 was the dry
" season, and the feed was scarce. I went once there
" for the purpose of getting feed. In 1864, the water
" came down in April, perhaps. *After reaching my*
" *camp on the east side of Buena Vista Slough, in* 1864,
" *I remained there until* 1867; *and then moved camp*
" *again. I remained there three years. That was my*
" *headquarters there during those three years. I was*
" *taking care of stock cattle there.*

924 " Q—*What portion of the time were you about there,*
" *living there or making that your headquarters, in con-*
" *nection with your movements immediately around*
" *there?*
" A—*I think, perhaps, two months at the time. I*
" *would be off on rodeos. I would have to be away*
" *from there two months. It might have been a month*
" *out of the twelve months. I presume I was home* 10
" *months of the time. That would hold true of the years*
" 1864, 1865 *and* 1866. *I was looking out for my stock*
" *at the time.*
925 " Q—*Where did you run them—where were they run-*
" *ning?*
" A—*Running along the borders of that Buena Vista*
" *Slough and back in the plains. My cattle ranged down*
" *as far as Tulare Lake, and I went down as far as that*
" *in connection with my stock.* The water got very low
" in 1864; and in 1865 it was quite low. In 1866 it was
" full of water. In 1867 it was quite full of water—I be-
" lieve it was in 1866.
" Q—When you were down with your stock along the
" slough in 1864, were you crossing the slough from time
" to time?
926 " A—Yes, sir.
" Q—How many different points do you suppose you
" crossed those years, 1864 and 1865, when the water was
" low?
" A—In the lower part of it I was crossing and re-
" crossing several times a day there for perhaps a week
" at a time, every month, for 3 or 4 months. That was
" in the lower part of the slough where I had left the cat-
" tle first. I then moved them further up.
" Q—After you got them further up, how was it about
" that crossing?
" A—The crossing was quite good after the water
" went down. It got quite dry all the way up. That
927 " was in 1864. Buena Vista Slough got quite dry. In
" 1866 there was a large supply of water running
" through there. I was still there with my stock and
" ranging them between the two lakes. I was there in
" 1867 also, and still had the stock in the same place. I
" left my camp on the slough in 1867. I don't remem-
" ber the months, but it was along in the fall, I think.
" I moved about three miles almost north from there, on
" to the Goose Lake channel.
" Q—*Can you fix the point on this map where you*
" *were from* 1863 *to* 1867; *take Map No.* 1, *where you*
" *camped during those three years?*

928 " A—*It was about Sec.* 19, *T.* 30, *R.* 24. *It might*
" *have been on Sec.* 24. *It was on or near that place.*
" *That is about a mile south from Wible's Camp. I went*
" 14 *miles from Buena Vista Lake, and it may have been*
" *further. I expect it is.*
" Q—*There is a point that has been referred to as the*
" *Old Tracy Crossing. Where was that?*
" A—*The Old Tracy Crossing was bordering on Sec.*
" 24.
" Q—*Was it right close to your camp?*
" A—*It was right close to our camp, and in the same*
929 " *Township,* 30 *S.*, *Range* 24 *E.* In the Fall of 1867 I
" moved to a point in T. 30, S. R. 25, E. (Examines the
" map.) It was on Sec. 4, I think. I think I remained
" there 3 or 4 years. During that time I was taking care
" of the same stock. I don't remember just when I
" left there. I was there in '71, at that place, and in
" 1872.
" Q—Then you remained there until 1873?
" A—Yes, sir; I think in 1873, I was there. In 1874, I
" think I moved further down. In 1867 and '68, I was
930 " ranging my stock on Buena Vista Slough, and also had
" some of them on the Goose Lake side. I was ranging
" on both sides. I was going all of the distance along
" Buena Vista Slough, between Buena Vista and Tulare
" Lakes. I was crossing to and fro in 1867 and 1868;
" and during 1869, I was along on Buena Vista Slough
" with my stock. I had stock along on both sides of
" that slough, though I intended to keep them on the
" east side. That year I was crossing to and fro all of
" the while.
" Q—How often did you make those crossings in 1867,
" '68 and '69?
931 " A—We used to cross the slough at Tracy's Crossing.
" We used to cross it down below Weed Island, and
" would cross Weed Island sometimes.
" Q—When you crossed below Weed Island, how did
" you cross?
" A—We went right straight through. In times of
" high water, we would go through the tules, and wind
" around considerably.
" Q—How would you make the crossing there? Did
" you swim it or ferry across?
932 " A—At my crossing above we used to have a tule
" boat when the water was very high. Otherwise when
" it was not, we would go in on the bank and swim the
" horses through; that is at the upper crossing. I have

" crossed below Weed Island. When we crossed through
" there we went on horseback.
" Q—How would you find the water at that point?
" A—We would go across there without swimming, be-
" low Weed Island, by hunting for the shallow places
" and going around the deep places. There was another
" point we crossed considerably further down, and we
" used to cross on Weed Island.
933 " Q—On Weed Island?
" A—Yes, sir. Go across both branches there and go
" through Weed Island.
" Q—In crossing Weed Island, how many branches did
" you find of the slough?
" A—Two branches.
" Q—How deep would the water be in those two bran-
" ches; would you have to swim?
" A—On the east branch we would have to swim, gen-
" erally a little ways; on the west side we could get
" through without swimming.
" T., II., fol. 919 to 933.
" * * * * *
" Q—*During the whole time that you have been on*
" *this slough, from* 1863 *down to* 1878, *how many times*
" *do you suppose you have crossed it from one side to*
" *the other?*
" A—*I have crossed it a great many times. I would*
947 " *not know how to guess at the number of times. Per-*
" *haps I have crossed it—I might have crossed it* 200
" *times.*
" Q—At how many different points do you suppose you
" have crossed it?
" A—Well, at the upper part of the country there we
" generally had crossings. But below, further down, we
" crossed it whenever we came to it.
" T., II, fol. 946-7.
" * * * * *
" Q—Then take it from the line between Townships 27
" and 28 going south, you say you generally had places
" to cross?
" A—Yes, sir. There is one place.
" Q—How many?
" A—Well, from that point Weed Island was about the
" first place. *There was no crossing between my cross-*
" *ing of Weed Island where we would cross from half a*
" *mile below my old crossing to Weed Island,* there was
951 " no crossing at that time during those years. In 1877
" they did cross some, at the head of about the west line

" of Sec. 15, in the swamp land, there was a crossing
" there. That was in 1877.
" Q—*And previous to that I understand you to say*
" *that there was no crossing from your crossing to the*
" *upper end of Weed Island?*
" A—*To the middle of Weed Island.*
" Q—*How far would that be?*
" A—*It would be about* 7 *or* 8 *miles.* But I cannot
952 " tell it by this map, because Weed Island don't seem to
" be shown on it (referring to map 1.) I could not tell
" on this map exactly where the head of Weed Island
" comes. I can tell where we used to cross on Weed
" Island (examining the map.) It must be somewhere
" down here. That would be about eight miles below
" my crossing. That was the first crossing that we had
" south of my crossing prior to 1877. We used to cross
" again some 12 or 15 miles below the Tracey crossing.
" Then we had another crossing eight miles down. We
" used to go in the tules there—there were some islands,
" little islands; we used to follow from one to the other
953 " and work in the deep places in the slough, and crossed
" some 12 or 15 miles below the place below the Tracey
" crossing.
" T., II, fol. 950-3.
" * * * * *
" Q—*Now, what was the condition, if you know, dur-*
" *ing those years, of Buena Vista Slough from the point*
" *where it left the lake for the first twenty miles down*
" *the slough, between* 1863 *and* 1867 *and* 8?
" A—*From* 1863 *up to* 1867 *and* 8, *there was an open*
" *channel of water running down there.*
" Q—*How far from the lake was that an open channel*
" *from* 1863 *to* 1867 *and* 1868?
" A—*It was an open channel down to the center of*
" *Weed Island; and through Weed Island was an open*
" *channel.*
" Mr. Garber. Q—*An open channel down through*
955 " *the center of Weed Island?*
" A—*Down to Weed Island; through it there was a*
" *channel, but it was not well open through it.*
" Q—*What is that?*
" A—*It was not very well opened. There were some*
" *obstructions in there of flags that had grown up in the*
" *channel at the head of it. I mean at the head of Weed*
" *Island.*
" Q—*How far down would that be? You say it was*
956 " *down through Weed Island. How far would that be*
" *from Buena Vista Lake?*

" A—*About eight miles from the crossing, the way*
" *you would go. It was about four or five miles to the*
" *lake. It would be* 13 *or* 14 *miles.*
" Mr. HOUGHTON. Q—*How far down that slough did*
" *you go from Buena Vista Lake before the slough*
" *divided and ran around Weed Island?*
" A—*I think it is about* 12 *miles down from Buena*
" *Vista. It may be a little more. I am not exactly cer-*
" *tain about the distance.*
" Q—Well, what was the condition of these sloughs
957 " after they divided at the head of Weed Island and
" down to the range line between Township 28 and 29?
" A—Well, from the head of Weed Island up to 1868,
" the channel ran more directly through the land. The
" water went through the land. After 1868 it divided al-
" most entirely there at the head of the island. It spread
" out on each side of this place in 1868. It washed out a
" channel to the right and left more.
" Q—I understand you that prior to 1868, all of the
" water went through the island?
" A—More water, a good deal more went than after-
" wards.
" Q—Then, what was the condition of the slough or
958 " sloughs, whatever they may have been, between 1863
" to 1868 from the lower end of Weed Island; that is the
" northern end of this township line between Townships
" 28 and 29?
" A—The water ran along in a wide channel, the most
" of the water.
" To Mr. GARBER—The water ran down to this place;
" the water he speaks of in the wider channel.
" Mr. HOUGHTON. Q—How wide would that channel
" average between those township lines we refer to be-
" tween 28 and 29, in the lower end of Weed Island?
" A—At a low stage of water it might not be more
959 " than 100 feet wide on an average.
" Q—How wide would it be upon the average before
" it would overflow?
" A—Oh, well, it would be of different width. It
" might run a rod wide in some places, and ten rods in
" others.
" Q—*How wide was Buena Vista Slough channel be-*
" *tween the lake, where it left the lake and your cross-*
" *ing between* 1863 *and* 1868?
690 " A—*I think that that would average from* 50 *to* 100
" *feet.*
" Q—*How was it from there down where you say it*

" *was confined to one channel moving through to Weed*
" *Island?*
" A—*Running through Weed Island and down to Weed*
" *Island, it ran very much the same. From my crossing*
" *or Tracy's crossing down two or three miles. It would*
" *average from* 50 *to* 100 *feet. And then it was not*
" *quite as wide perhaps for two or three miles more.*
" *From the head of Weed Island a portion of the water*
" *would go around in the other two channels you have*
961 " *described to the east and west of Weed Island.*
" Q—After those channels passed Weed Island,
" east and west, would they connect with the main chan-
" nel below?
" A—Yes, sir.

T., II, fol. 954 to 961.

" Q—*Now, Mr. Tracy, you have given the description*
" *of Buena Vista Slough, and the sloughs where the division*
" *takes place, from where it leaves Buena Vista Lake and*
" *Tulare Lake as they existed from* 1863 *to* 1868. *Has*
975 " *there been any change or material change in the sloughs*
" *since that time?*
" A—*I think not; none that I remember of.*
" Q—*What was the condition of these sloughs when you*
" *saw them, from* 1863 *to* 1868, *as compared to the last*
" *time you saw them?*
" A—*There was no material change from the slough to*
" *the head of Weed Island in all those years.* From where
" the sloughs come together, after leaving Weed Island,
" there was no change that I know of in all those years.
" Q—You say there was no change below that point, was
" there any change above?
976 " A—The water washed out the channel that run
" through Weed Island in 1868, on both sides, more
" than it had before.
" Q—What caused that, do you know?
" A—Well, I think, one cause was the filling up of the
" center channel somewhat.
" Q—Do you know what caused that channel to fill up?
" A—There was a very great flood at that time, and
" some drift came down into it.

T., II, fol. 974–6.

" Q—Did you ever go down Buena Vista Slough in
" a boat?
" A—I used to have a boat on Buena Vista Lake.
" Q—Well, did you ever go down the channel in a boat?

" A—I have went down some distance. I never went
984 " down quite as far as Weed Island. I have been down
" there trying to get cattle out in very high water. I
" have been down six or seven miles from my camp on
" the bank. I have also been on the slough above my
" camp, and up as far as the lake. I was at one time on
" the river, and have been on the slough above there con-
" siderably with a boat.
" Q—Have you ever been on Buena Vista Slough,
" below Weed Island, in a boat?
" A—Yes, sir; we were crossing over on the tule boats
" frequently.
" Q—Was that all?
" A—I don't remember of having one only at one other
985 " place. I forget what boat that was. That is where the
" lake came by what we call the hog camp; we had a
" boat there. I have forgotten what kind of a boat it
" was we had crossed in.
" Q—You have land along that slough, haven't you?
" A—Yes, sir.

T., II, fol. 983–5.

Cross-examination of

MR. F. A. TRACY.

" Mr. FLOURNOY. Q—You have been, as I understand
" it, comparatively familiar with Buena Vista Slough,
" from the old Tracy crossing to Tulare Lake, ever since
" 1863?
" A—Yes, sir.
" Q—Has there been at all times during that time a
" continuous current of water through Buena Vista
" Slough from the Tracy crossing to Tulare Lake?
" A—No, sir.
" Q—At times has there been?
991 " A—In 1863 and 1864, and 1871 and 1877. I think
" those are the years that it has been comparatively dry.
" Q—What portion of the year 1863, was that the
" condition?
" A—It was quite late in the fall of the year, that I
" was there, and then I found the water standing in
" holes; the one that I stopped on, I think it was about
" a mile and a half long; it remained in that condition
" until toward the spring of 1864. I reached there about
992 " October, 1863; I should think it was as late as that
" anyway; it may have been the first of November.

" Q—About what time the following spring—it re-
" mained up to what time the following spring?
" A—It might have been something near April, per-
" haps after the water of '64 ran down, and I was camped
" on the slough there, and it filled up, passed my camp,
" and left me on an island; ran around me."

T., II, fol. 990–992.

We have given the testimony of the witnesses, J. C. Crocker, S. W. Wible, Milton Norton, F. M. Epperly and F. A. Tracy quite at length, for the reason that all of them have been engaged in business on Buena Vista Slough between Buena Vista and the Bonestell House for years, four of them living on the banks of the slough, and the other, Crocker, engaged nearly all of his time on Buena Vista Slough raising cattle and attending to the stock of plaintiffs, who have had ranging from 1200 to 15,000 head of stock on Buena Vista Slough ever since 1869.

Every one of these witnesses, by his testimony, shows a knowledge of the condition of the Buena Vista Slough country from Buena Vista Lake to the Bonestell House, that comes only from just such an experience on and along Buena Vista Slough as the witnesses have had, living on and working along the Slough for years.

We next call attention to the testimony of F. P. McCray, called as a witness for plaintiffs, a civil engineer and ex-county surveyor of San Benito County, who, in 1877–8, long before this suit was commenced, made a meander survey of Buena Vista Slough from where Kern River emptied into it down to and into Sec. 24, T. 29 S,, R. 23 E., or to Bonestell's house, and about the same point where Macmurdo and James left off their meander survey of the slough. He, at the time he made the survey, made a map of the Buena Vista Slough lands that were included in Swamp Land District 121, showing the line of Buena Vista Slough to the point where he ceased meandering it. That map

is in evidence (Exhibit "B"). There is also in evidence plaintiffs' Exhibit "2," another map made by this witness, made just before the trial of this action, showing the line of Buena Vista Slough not only to Sec. 24, but all the way to the Township line between Townships 27 and 28. He testified in relation to Buena Vista Slough to Bonestell's, or to the northern terminus of his and of Macmurdo and James' meander survey of the channel of the slough, as follows:

"By Mr. HOUGHTON. Q—Mr. McCray, what is your occupation?
" A—My occupation is that of surveyor. Have been a surveyor for about 12 years or over. My home is in Hollister, San Benito County. I have been County Surveyor of that county for 6 years. I have made surveys in this county on what is known as the Buena Vista Slough.
375 " Q—Have you made surveys there in tracing sloughs that run through the body of swamp and overflowed land along that slough?
" A—Yes, sir.
" Q—Have you, in connection with the survey, platted the same on a map?
" A—Yes, sir.
" Q—Is that one of the maps that you have made in connection with this? (Map shown witness).
" A—Yes, sir.
" Q—I will ask you to look at that?
" Mr. MCALLISTER. Call that map No. 2.
376 " By Mr. HOUGHTON. Q—State if that is a correct delineation of the slough or channels that run through that body of swamp and overflowed land, as far as that extends?
" A—That is substantially so; yes, sir.
" Q—You made the survey and plat in connection with that?
" A—I made the survey of this portion of the slough, and the upper end of the swamp is meandered. There is the beginning of the levee, and that portion of the slough.
" By Mr. GARBER. Q—That is what is called Wible's
377 " Camp?
" A—That is headquarters Wible's Camp. A portion of the slough running considerably beyond the map has been meandered down to the same point, to where the

"button willows spread, Sec. 14, T. 29 S., R. 23
"E.; thence from that point, all that portion which is
"shown on this map was subdivided by myself, and at the
"crossing of the section line, these sloughs were noted,
"and the balance were sketched in between them. For in-
"stance, to show where the sections run, there it was
"crossed, there again it was crossed, and so on. All that
"was to connect these between these crossings of section
378 "lines. They were sketched in on the field.
"Mr. McAllister. That would be map No. 2, Mr. Re-
"porter.

T., II, fol. 374-8.

"By Mr. Houghton. Q—I understand you to say, Mr.
379 "McCray, taking Buena Vista Slough from where it leaves
"Buena Vista Lake, that you meandered that line, or fol-
"lowed it right down to Section 14, Township 29 South,
"Range 23 East.
"A—Not the entire distance from Buena Vista Lake.
"Q—From what point then?
"A—From where New River enters the slough.
"Q—From where which branch of New River enters the
"slough?
"A—Well, where the branch that enters by what is
380 "known as the "Point of Hills." That is the northern
"branch.
"Q—You have meandered it from where the northern
"branch of Kern River empties into Buena Vista Lake
"down to Section 14, Township 29, Range 23?
"A—Section 14, to that point. I made the survey and
"marked all the crossings where the section lines crossed
"the slough. I noted them, and between those points it
"was sketched in.
"Q—On the field?
"A—On the field, as a rule.
"Q—What do mean by as a rule?
381 "A—Well, sometimes; I might answer the question this
"way. When they were sketched on the field, they were
"done just at that moment. It might have been done
"sometimes afterwards, before they were made.
"Q—How long afterwards would it be in any case?
"A—Well, it would not be any length of time, so far as
"that is concerned. It would be during the survey, is
"what I mean.
"Q—Then these channels, as they are shown on this
"map, are correct, as they are on the grounds delineated
"here, as they are on the ground?

382 " Mr. Garber. What is that?
" Mr. McAllister. The channels of Buena Vista Slough
" as delineated on maps 2 and 3, are correctly expressed as
" they now exist on the ground?
" A—I think so; yes, sir.
" Mr. Houghton. Q—This is made from an actual sur-
" vey. When they crossed the section lines it is made
" from actual survey. Then, if there was any error at all,
" it was simply as to the channel between the two section
" lines?
" A—Yes, sir; that is all.
" T., II, fol. 379–382.
" * * * * *
" Mr. Houghton. Q—This survey extends through all
" the lands described in the complaint in this case, doesn't
" it, or do you know?
" A—Yes, sir; it does.
" Q—Have you marked on that plat, in any manner, the
" land that is described in this complaint, to designate it?
" A—Yes, sir.
" Q—How?
" A—By bordering it in red.
" Mr. McAllister. Q—Then that encircled in red is
385 " land described in the complaint?
" A—Yes, sir.

Cross-examination of

F. P. McCray.

" The lands in red are those contained in a schedule
" shown to me, and said to be contained in the complaint.
" That is all I know about it. *I personally meandered*
" *that slough from where the north fork of the delta of*
" *Kern River enters Buena Vista Slough down to Section*
386 " 14. *The line of that slough in this map represents the*
" *meander lines—represents the slough. By the slough I*
" *mean the channel that runs down through that swamp*
" *land. I mean the channel that is marked there by those*
" *lines. At the time I surveyed there was no water in it.*
" *That was in December,* 1877. *The channel was marked*
" *by perpendicular banks, and by various widths and*
" *various depths. There were places where it was fifteen*
" *feet deep, and others, perhaps, not more than three feet*
" *deep. In running that meander, I located that slough*
" *by metes and bounds—that portion of it. I established*
387 " *stations at every bend of the channel, and took the*
" *courses and distances between those points from one bank*

" *to the other subdivision of those lands on map* 2, *and the*
" *meandering of that slough was done in Dec.*, 1877, *down*
" *to Section* 14; *that is, down to Section* 14. *In meander-*
" *ing that slough, from where the north fork enters Buena*
" *Vista Slough down to Section* 14, *northward, I did not*
" *observe any place where there was no appearance of a*
" *channel.* At a point just before reaching Section 14 the
" slough widens, and the banks are not so prominent as
" they are above there or a little further down.

388 " Q—*Down to that point, about near Section* 14, *on to*
" *Section* 13, *are you positive that there was a continuous*
" *defined channel?*

" A—*Yes, sir; I say to the north boundary of Section*
" 24. *They are all right together.* At that point, the chan-
" nel changes and widens out somewhat, and the banks are
" not perpendicular. It could be crossed easily, and it was
" more of a water way.

" Q—Has the slough defined banks?

" A—I would so term it; yes, sir; that is to say it was a
" channel; it was to be easily seen water would flow along
" that place. I could see that water had been along there;

389 " could see the marks of the water with a sort of defined
" margin. In running this meander line I was assisted by
" my surveying party; the same party that subdivided the
" land. I was at that time engaged in subdividing the
" swamp, a part of it known as swamp land District 121.

" Q—How long did it take you to meander that section
" of swamp land, from the north fork to 14?

" A—When I would go through with one township I
" would meander it, and then, at another time, would
" meander the balance of it. I think there were two or
" three different times I was engaged at it. I presume the
" whole time devoted to meandering was two days.

T., II, fol. 384–389.

RE-DIRECT EXAMINATION.

422 " MR. HOUGHTON. *I understand you to say that you*
" *have meandered this slough from the point where the*
" *North Fork of the New River runs in down to a point*
" *on Section* 14, *Township* 29 *south, Range* 23 *east, where*
" *the slough divides?*

" A—*Yes, sir. I mean that I have surveyed along its*
" *banks; taking the courses and distances of the bends.*
" *The condition of it down to that point is, it has va-*
" *rious different widths and depths, and perpendicular*
" *banks as a rule. The distance from between those*

" *two points, without following the meander line would*
" *be* 13 *or* 14 *miles.*
423 " Q—Then I understand you to say from about that
" point when you ran this survey in 1877 and '78, and
" ran section lines through this swamp land, that you
" located the slough or sloughs that you came across at
" every point where they crossed the section lines. Is
" that so?
" A—Yes, sir.
" Q—Did you, in connection with that, give at these
" points the width of that slough?
" A—Not always. *On the map which I made for the*
" *Kern Valley Water Company there only appeared the*
" *survey of this stream down to a point where I stopped*
424 " *meandering; and below that point there was nothing*
" *in the plat to show the meanderings of that slough or*
" *the crossings of that slough. The balance of the work*
" *done by me in the field to enable me to plat this*
" *slough from the point where it was dropped in* 1877
" *and* 1878, *has been done within the last three weeks.*

T., II, fol. 421–4.

RE-CROSS EXAMINATION.

" Q—You had a map that this (map 2), purports to
" be a copy of?
" A—Yes, sir.
" Q—That you stated was not an exact copy; where is
" that map? When did you see it last?
" A—That map was turned over to the Kern Valley
" Water Company. I saw it last within the last week or
468 " two, at various times. I have seen it three or four days
" ago, perhaps.
" Q—In whose possession?
" A—I don't remember now.
" Q—Whose individual possession have you seen it in?
" A—I dont remember.
" Mr. HOUGHTON. I have got the map.
" Mr. FLOURNOY. Will you introduce it?
" Mr. HOUGHTON. I don't know whether I shall or not.
" Mr. FLOURNOY. We ask you to produce it if you have
" got it; will you produce it?
" Mr. HOUGHTON. If you want the map you can have
469 " it. I don't know whether it is here, or down at the
" hotel.
" Mr. FLOURNOY. As to that part of it, I will not ex-
" amine just now as to that particular branch. I would

" like to suspend the cross-examination of this witness,
" until we can get that map.
" Mr. HOUGHTON. I know that I have the map, and I
" can get it.
" Mr. FLOURNOY. We will suspend the cross-examina-
" tion of this witness, until we get this map.

T., II, fol. 467–9.

" F. P. MCCRAY,
"
802 " Re-called for further cross-examination.
" Mr. FLOURNOY.—Q—I understood you to say when
" you were last on the stand, that you made a map from
" your field notes—your work in the field of 1877—you
" made a map in 1877 and 1878, corresponding with what
" we call Map No. 2, from the north fork of the delta of
" New River up to the point as indicated by Map No. 2?
" A—That map does not show the north fork of the
" delta of New River.
" Mr. FLOURNOY.—You meandered from that point at
" that time?
" A—I meandered from that point, sir. I don't remem-
803 " ber how many maps I made of that from my work at
" that time. The map of 1877 and 1878 was made in the
" latter part of 1878. No. 2 is not an exact copy of that
" map. The map I then made does not show the sloughs
" as it is shown on map 2. It was made for one purpose,
" and Map No. 2 was made for another, I don't remember
" when I saw my field notes last. I did not have my
" original field notes when I made Map No. 2.
" Q—Then how did you run out the slough—from
" memory?
804 " A—No, sir; I had sketches of it that had been pre-
" pared previously. I was also upon the ground.
" Q—I understood that you did not run over that
" ground again this time; that your present work was
" made on No. 3?
" Mr. HOUGHTON—No; he said he did.
" Mr. FLOURNOY—You did run over it again?
" A—Yes, sir.
" Q—The whole of it?
" A—Such portions as I was not familiar with or
" needed it.
805 " Q—Well, does not the map which you made in 1878—
" that is a correct map, isn't it?
" A—That is a correct map for the purpose designed.
" Q—Hasn't it got the slough on it?

" A—It has a portion of the slough upon it.
" Q—What was the object of meandering the streams at
" that time, in 1877 and 1878?
" A—I received instructions to do so.
" Q—In 1877?
" A—Yes, sir.
" Q—You received instructions to meander the stream?
" A—Yes, sir.
806 " Q—With what view?
" A—Just instructions to do so. These things are not
" always explained to the surveyor. I took notes of the
" meander of the whole stream.
" Q—Is making your map and marking the slough,
" was there any reason why the whole course of that
" meandering was not put upon it?
" A—Well, my meanderings that I meandered at that
" time were put upon it—those that I ran along the
" bank.
" Q—Then the map was a correct map so far as you
" meandered it, as to the slough?
" A—Yes, sir.
807 " Q—And was identically the same as No. 2?
" A—This (No. 2) is taken from that. I made several
" maps of portions of it, perhaps sketches more than any-
" thing else. I had made sketches of a portion of the
" swamp previous to that.

T., II, fols. 802–7.

" Q—When you surveyed in 1877, did you find any
" current between Sec. 14 and the point at the northern
" part of map No. 2?
" A—Yes, sir.
" Q—Did you find any current at Weed Island?
" A—Yes, sir.
" Q—I misunderstood you then, yesterday. I thought
" you said just before you reached Sec. 14, the water
" gives out?
" A—Well, I was there at different times. I did not
" finish my work at that time. I did not finish my work
819 " in 1877 on that swamp. I found no water there in
" 1877. I was there the latter part of October, and in
" November and December. There was no current then
" at Weed Island.
" Q—Do you speak of this channel that you have been
" describing from actual observation by seeing the water
" running in it or over it?
" A—Yes, sir; I have been in it when there has been
water in it.

" Q—What part of it?
820 " A—All over it. I don't know what parts of it. I
" have been over it and across it at many places. I have
" been through it after dark and at all times. *I have not*
" *seen water running to Tulare Lake, not from Wible's*
" *to Tulare Lake, but from that portion that is represent-*
" *ed by Map No.* 2 *to the junction.* I have seen it run-
" ning on portions of the land represented by Map No. 3
" on the southern portion.
" Q—*How came that to be running? Where did the*
" *water come from?*
" A—*From Kern River.*
" Q—*How did it get there?*
821 " A—*It came down Buena Vista Slough.*

T., II, fol. 818—821.

Re-direct examination:

" Mr. HOUGHTON. Q—You say, in making map No. 2,
" you had and used map B, which is in evidence?
" A—Yes, sir.
" Q—*When did you make that map B?*
" A—*In* 1878. *That was made from field notes and an*
1645 " *actual survey made by me, and that was my report*
" *when I handed in the map; the map was made accom-*
" *panying it; that map was the result of my survey of*
" 1877-78.
" (The witness is shown Exhibit D.)
" Q—Map "D" does not show a continuous slough in
" there through those swamp lands. How is that? Will
" you explain that?
" A—At those points where the sloughs are made, they
" partake somewhat of the nature of the main slough run-
" ning down by Wible's Camp.
1646 " Q—*No; but I ask you why the slough stops at Sec-*
" *tion* 24. *After that is there not a continuation of the*
" *slough? Why does that appear in that manner on that*
" *map?*
" A—That is as far as I meandered it.
" Q—Was that as far as you ran with a view to locating
" the slough at that time?
" A—I made a survey of it.
" Q—*Did you pretend at that time to locate the slough*
" *beyond* 24?
" A—*No, sir.*
" T., II, fol. 1644-46.

"Q—Well, didn't you meander the slough at that "time?

"A—I did meander the slough in 1877.

1653 "Q—Did you meander the slough at the time these "sketches were made?

"A—No, sir; I don't think I did; I don't know that I "did.

"Q—Did you make two surveys of this Swamp Land "District in 1877?

"A—I began the survey in 1877; I carried it on a cer-"tain distance and then I discontinued it. Along the "latter part of 1877, about the end of it and in March, "1878, I continued again."

T., II, fol. 1552–3.

We then have the testimony of twelve witnesses, called for plaintiffs, who have been employed on Buena Vista Slough for from 5 to 20 years. They have been there in charge of cattle; they were running in Buena Vista Slough from Buena Vista Lake to Tulare Lake, some of them owning stock; others working for other parties who had stock on the slough.

T. W. Barnes, for plaintiff, who had resided at Canfield ever since 1864, some six miles from where New River enters Buena Vista Slough, was first on Buena Vista Slough in 1863 (T., II, fol. 1320). Relating to Buena Vista Slough, he testified:

"Q—What has been the main channel since 1868?

"A—It has been constantly in New River; that has been "the main channel ever since 1868.

"Q—During the years between 1863 and 1868, when "you were at Camfield, on the head of Kern Lake, were "you ever on those lakes?

"A—On those lakes?

"Q—Yes.

"A—Yes, sir; I have been around there, inside and "outside, on the tules.

1319 "Q—What were you doing on the tules?

"A—I was going after my hogs; I went on the lakes "in a boat; we lived at the head of the lake in 1863, and "boated clear down in Buena Vista Lake from my place; "that was called Sportsman's Hall; I ran a boat down "the lake through the slough between the two lakes, and

" into Buena Vista Lake; the water dried down to the
" channel, and left high water in the slough; my hogs
" would go over in there, and I could not get them with
" my horse, and that forced me to take a boat to go in
" there and get them out; the water was then going into
" Buena Vista Lake; that was in 1863.

1320 " Q—*During the years between* 1863 *and* 1868, *where*
" *did the water go to after passing into Buena Vista*
" *Lake.*

" A—*Down into Buena Vista Slough, and in the direc-*
" *tion of Tulare Lake, north. I was on Buena Vista*
" *Slough first in February,* 1863.

" Q—*What was the condition of the slough at that*
" *time?*

" A—*It was quite a large stream, nearly from bank to*
" *bank. In low places it was running over. It was run-*
" *ning towards the north. In low places the water was*
" *runniny over the banks branching out. At that time I*

1321 " *followed the Buena Vista Slough about ten miles,*
" *below the Tracy's Crossing ten or twelve miles, and*
" *about opposite Weed Island, between the crossing and*
" *the Murphy Corral. I was working then with my hogs.*
" I was again on Buena Vista Slough in 1864; I was there
" on the same business. In 1863 I was there from Febru-
" ary until May, or to the last part of April; and I was on
" the slough then during the year; I was over there every
" three or four weeks during 1863; I had my hogs on the
" slough from the lake down to the Tracy crossing; I had
" a lot of hogs of mine and a lot for Mr. Skyles on shares;
" I let mine go, and mine were young hogs; and that was

1322 " my object in looking after Skyles', to save mine. I went
" on Buena Vista Slough in 1864, along in May; I got
" back to my place along in May, the 4th of May; I don't
" know how long I was there; I was there on and off every
" week or two; I was there during that year from time to
" time; I don't think there was any month during the year
" that I was not on the slough.

" Q—What was the condition of the water in 1864 on
" the slough?

" A—It dried down considerably. It was quite low.
" I went down the slough in 1864, and to Tracy's camp
" along there; I was on the swamp again opposite, prob-

1323 " ably Goose Lake, but not all the way up or down; I went
" in there to get some cattle that I bought from Mr. Broder
" in 1864; the swamp was dry down where I struck it; I
" don't think I was that summer on the slough at any
" point between Tracy's Crossing and Goose Lake; when

" I went down there for my cattle I found they were right
" opposite Goose Lake, at Broder's place, in the swamp,
" on the edge of this swamp; I was not up and down the
" swamp that season, from there to Tracy's Crossing; I
" probably was down as far as Murphy's Corrall, on Weed
" Island, right below Tracy's Crossing, 3 or 4 miles,
1324 " about the head of Weed Island; I don't think I was
" below that summer; I was there taking care of hogs,
" and looking after them; I think I was there first in Jan-
" uary or February, 1865, along about that time; *I was*
" *there from the lower end of Buena Vista Lake down about*
" *that far along the swamp down to Weed Island; I could*
" *not tell how many times I was there on the slough in*
" 1865, *exactly; I was on that slough a good many times*
" *during the summer;* I don't think I was below Mur-
" phy's Corral, on Weed Island, any time in 1865; that
" season the water was dry; dried up into holes; I was
1325 " there during the spring and summer months of 1866,
" at different points, not as close in, because I could not
" get in as close down the slough; I was down, following
" the water down to Goose Lake and back; there was a
" great deal of water in the country at that time; I was
" there in different times; I could not tell; it was along
" in the spring and summer months; I could not tell
" exactly about the date; I was there in April, May or
" June and there was a great deal of water through there
" in 1866; I knew of the dam to cross that slough; it was
" put across from the end of Buena Vista Lake; Colonel
" Baker put that dam across below the lake; it was put
" across in the winter of 1864 and 1865; I furnished
1326 " Colonel Baker with the bacon that he fed his
" men on; I think that remained until July, 1866,
" T., II, fol. 1318–1326.
"
" In 1867, I was along the
" slough at different times in the spring; I still had my
" hogs there; I never sold them out from that time; I
" have never sold them out; I could not tell positively if
" I was there every month of the year; I was down there
" off and on; there was considerable water in that country
" in 1867; I was there in 1868; there was more water there
" then than I wanted to cross; I was there in 1869; I
" could not tell in regard to the number of times exactly
" that I was there; I was there several times.
" Q—How low down on the slough did you go in 1869?
1330 " A—I think I was down the slough as far as Goose
" Lake.

" Q—With your hogs?
" A—Working back and forth with cattle and hogs; I
" was on the slough in 1870; I don't think in 1870 it was
" below Weed Island; it might afterwards; that is, along
" the slough, I don't think I went below Weed Island; I
" was on the slough in 1871; the same business; there
" was plenty of water there in 1871; in May there was a
" great deal of water down in that country; I could not
" say as to the number of times that I saw the slough in
" 1871; I was there several times during that spring and
" summer, winter and spring; I was there also during the
1331 " summer and fall. There was no water in New River in
" the fall of 1871 for a little while; there was water in the
" slough but you may say draining water from the lake;
" it was draining off of course to the low land, seeking
" its level; nothing to force it; that was in the summer of
" 1871.
" Q—What did I understand you to say about the water
" in New River at that time?
" A—I think it was in August, 1871, I was Superintend-
" ent of the Buena Vista Ditch Company; there was a
1332 " call made for water by one of the Company and I turned
" in all of the water there was in the river into that ditch;
" I think it was in August, probably, 1871. I was on the
" slough in 1872; probably I went down at the same point
" to Weed Island—Murphy's Corral; I was not there
" every month in 1872.
" Q—You say that you were down to Weed Island sev-
" eral years. Did you cross to Weed Island during those
" years?
" A—Yes, sir, I was there in the fall of 1871; I was
" there in the summer of 1869, on Weed Island and on
" the upper end of Broder Island; I swam into the Broder
1333 " Island, I think, in 1869, twice; I swam the horse; I was
" on Broder Island probably three or four different times;
" I have crossed at different stages of water; I have crossed
" it when it was perfectly dry.
" Q - When you found running water there, how deep
" would you find the water in making your crossing to
" Broder Island?
" A—Well, where the trail went over—the highest
" time I ever was in there—it swam my horse. I suppose
" there was about six or eight feet of water.
" Q—What would be the condition of the water in
" making the crossing to Weed Island?
1334 " A—When I went to Weed Island the deepest water I
" found was about up to there (breast high.) I left my

" horse on the other side; I went on to Weed Island in
" 1866; the deepest water I found struck me about
" shoulder high; I left my horse on the other side; I also
" crossed on to Weed Island in 1872; there was a great
" deal of water there in 1872; about the deepest water I
" found then was probably three feet, going on to the
" island; I was on the upper end of the slough in 1873; I
" don't think I went down to the island in 1873; in 1874
" I was not far down; I don't think I was below Wible's
1335 " Camp in 1874; I was on the upper part of the slough;
" I went down to about Dixon's and Wible's Camp, and
" along there; I was there in 1876; I was at Wible's
" Camp; I don't think I was two miles below Wible's
" Camp in 1876, right along the canal; I hauled from the
" time they commenced the canal; I was freighting there
" for the company; I was down there in 1877—as far
" down as the canal—probably twenty miles below the
" main camp; I could not state how many times I
" crossed that slough in 1877; there was hardly any
" eight or ten days that I was not crossing that slough,
" going to the camp with freight; the slough was dry:
1336 " the water was only in holes that I could find—no ruu-
" ning water; in 1878 I was there, down as far as the
" Canal Camp, at the upper end of the island; I was only
" on the slough from the Canal Camp along up towards
" the lake—I mean Wible's Camp; there was some water
" there in the camp in the spring and winter of 1878—in
" the latter part of '78; I don't think I was down there.
" In 1879 I was at one time at Wible's Camp; I don't
" remember when it was, but I think it was along in the
" spring; I was down on the slough as far as Dixon's, in
" 1880. I went down to Dixon's; I don't remember what
" for; I went to see the old gentleman; I was there at his
1337 " place once or twice during the summer of 1880.
" Q—*At about how many points have you crossed*
" *Buena Vista Slough, starting from Tracy's Crossing,*
" *and down to Goose Lake?*
" A—*Well, that would be a right hard matter for me*
" *to tell; going in and out there so many years, I could*
" *not tell you exactly how many places I have been.*
" Q—How many do you think?
" A—I will relate as near as I can; I cannot tell you
" the different points I have been on the slough, or cross
" the slough; I cannot tell you the exact date.
" Q—Tell as near as you can; we do not expect you to
1338 " tell every point.
" A—*I have crossed at the Canal Camp at Weed*

" *Island—the upper end of Weed Island; I have crossed*
" *Weed Island, I have crossed the slough going north of*
" *Weed Islond, and I have crossed down along side of*
" *Weed Island, on both sides, clear across the swamp;*
" *there from De Webber's place to the little corral; I*
" *have been clear across that slough, the swamp there*
" *freighting across there.*
" Q—When you have made these crossings, and the
" water was running in the creek, how deep did you find
" the water?
1339 " A—I never measured the water in the channel; I
" never measured the depth of it.
" Q—Would it be swimming?
" A—*I found it deep enough to swim most anything,*
" *deeper than I wanted to go through; I have found the*
" *slough swimming, and I have found them dried down*
" *into holes; when the water was running full it would*
" *swim most anything.*
" Q—Going across the slough, when the water was
" running there, how far did you usually have to swim?
" How wide did you find the channel?
1340 " A—That would be rather hard for me to say; a man
" riding along, going with his team, hardly ever thinks
" about the question being asked him—how far the chan-
" nel is. *I suppose the wides channel there is sixty to*
" *one hundred feet wide, opposite Weed Island; the*
" *main channel of the slough would be probably from*
" *sixty to one hundred feet wide: may be more, may be*
" *less; I would not say exactly the exact width of it,*
" *because I never expected the question to be asked me.*
" Q—What is the nature and condition of that channel
" when you have crossed it and been along it there;
" when it leaves Buena Vista Slough at the head of
1341 " Weed Island?
" A—*Well, it is a well defined channel down to the*
" *head of Weed Island; there the channel was choked up*
" *in* 1868; 1867–68 *that was overflowed by logs and*
" *drift: the channel choked up there.*
" Mr. Garber—What was that question?
" The reporter reads the last question.
" Mr. Houghton—Buena Vista Slough that should be.
" Mr. Garber—That is not the question then.
" Mr. Houghton—He answered as to Buena Vista
" Slough, instead of Buena Vista Lake.
1342 " The Witness—From Wible's Camp to Weed Island.
" Q—Where was that drift, you say?
" A—That drift was right at the upper end of Weed
" Island.

" Q—What did the drift consist of?
" A—It consisted of pine, redwood and spruce—such
" as grows in the Sierra Nevadas—driven into here by
" the overflow of 1867 and 1868, the same as thousands
" of other drifts in the river here; I saw logs in there,
" when I first found it, which were probably two feet in
" diameter, and of various lengths; some posts four or
" five feet long and some probably ten or twelve feet.
1343 " Q—*Before that drift formed there where did the*
" *main channel run?*
" A—*It ran right along by Weed Island; along there.*
" Q—*After the drift where did the main channel run?*
" A—*It kind of broke off with two separate streams,*
" *one to the east and one to the west, and worked off to*
" *the low ground.*
" Q—What was the condition of those channels from
" the head of Weed Island down to Goose Lake, where
" you have been in there?
" A—I have found the channels nearly every place I
1344 " crossed it; I never followed the channel from there to
" Goose Lake, directly along the channel, but I have struck
" the channel at different places.
" Q—And when you have struck those channels in dif-
" ferent places have you found water running in there?
" A—Sometimes I have found water; there is a drift
" there.
" Q—I mean in reference to whether the water would
" be running.
" A—Yes, sir.
" Q—In what direction?
" A—It run north; to the west of north.
" Q—How wide would the channel from Buena Vista
1345 " Lake to the head of Weed Island average?
" A—From Buena Vista Lake to the head of Weed
" Island?
" Q—Yes, sir.
" A—Well, I don't know; it is only supposition with
" me; I have never measured them, but I should say it
" was 200 feet wide.
" Mr. Garber. Wide?
" A—Yes, sir, the slough from Buena Vista Lake down
" to Wible's Camp or Weed Island.
" Mr. Houghton. Q—How deep would that average
" running down there, Mr. Barnes?
1346 " A—I think the water in there is twenty feet deep when
" it is full, or sixteen or eighteen; from that down to four
" or five feet; there is a place that I am satisfied that

" when it is bank full it would be twenty feet, when
" running over the banks.
" Q—What was the average width of the channel you
" have spoken of below the head of Weed Island and
" down to Goose Lake?
" A—The main channel there opposite Weed Island, I
" think, is all of 100 feet wide, and probably more; I
" would not say positively the exact width of it, because
" I never measured it. I have seen the crossing, and
" have crossed it when I had no team, and have probably
1347 " crossed there when it was dry; I never expected the
" question would be asked me; I never paid any particular
" attention; I know it is a good deal larger there than my
" pole and wagon and all, when I had a long hay frame
" on my wagon, hauling hay.
" Q—*How deep was the water there in that channel*
" *when it was running, when it was full?*
" *A—Well, various depths, like all streams, shallow and*
" *deep; there are places a great deal deeper than others,*
" *but deep enough to swim a horse when even banks full.*

T., II, fol. 1329–1347.

" Q—What was the condition of those lakes in the
" summer, between 1863 and 1879; after the spring
" freshets were over?
" A—Some seasons it was lower than others, owing to
" the amount of water that came from the mountains in
" the season.
" Q—Would the lakes be full or empty during those
" years?
" A—There was water in them every year, I think.
1357 " Q—How many years would they be overflowing, or
" water running out of them?
" A—The waters never dried down in the tules, or tule
" land, until 1879.
" Q—*Well, between the years* 1863 *and* 1879, *how*
" *many years have you seen the water discharged from*
" *Buena Vista Lake into Buena Vista Slough?*
" A—*Every year it would proceed down the slough.*
" *That was the only outlet.*

T., II, fol. 1356–7.

" On cross-examination he testified:
"
" Q—*Do you know anything about whether it shallows*
" *out so in places, that in a rise of the water, the water*
" *would run out into portions of the swamp before it*
" *connected in the channels?*

" A—*I imagine there are such places as that, as in all*
" *streams. Now Kern River spreads out all over the*
" *country at a high period of water.*
" Q—I mean before it would connect in the channel;
1361 " for instance, the channel is shallow and deep along
" there, and in some places it spreads out. Do you
" know whether or not when the water is rising, it would
" not spread out some over the swamp country before it
" would make a complete connection through in the
" channel?
" A—It might; I could not say as to that, because I
" never followed the channel from one end to the other.
" That was not my business.
" Q—You generally found water whenever the water
1362 " was very plentiful. It was about the swamp, wasn't
" it, when there was plenty of water?
" A—When there was plenty of water, when the water
" was running, I have found water all over the swamp at
" high periods of water; and at other times I have found
" it confined to the channel and in holes; dried down to
" holes. In 1870 there were very few holes that had
" much water in them. In 1877 it was confined gener-
" ally into holes.
" Q—*I mean when the water would be running, or*
" *swimming, as you speak of?*
" A—*Yes, sir; it was over a great deal of the country,*
1363 " *the same as Kern River is, or any other stream. It*
" *overflows its banks and spreads over a large scope of*
" *country.*
" Q—Were you ever there on the banks of what you
" call the slough, when they were full, and there was no
" water in the swamp?
" A—Oh! I found water in different places; may be
" it broke out from the slough.
" Q—Isn't there always water in the swamp about the
" time the slough is full, all along the channel?
" A—By its being full from place to place, I should
" think you would find places, most of the distances,
1364 " when it would break over; some places lower than
" others, some places higher. Of course, before it
" would rise to the highest bank, it would run over in
" the lower places, making through the swamp.
" Q—*Did not the water, whenever you found the*
" *channel full, as you call it; would not the water be*
" *generally spread out in the tules?*
" A—*Spreading out over the low lands, of course; the*
" *same as any other stream; the same as Kern River.*

" Q—Well, you say the same as any other stream.
" Does every stream, when its banks get full, have to
" spread out on the surrounding country?
" A—If there are low places, it will go out through
1365 " them if it is full to the high banks. If it is only full
" up to the low banks, there is not any place for it to go
" out.
" Q—Well, that is just what I am asking you about
" now. When it fills up as full as it can hold through
" the connection. I mean inside of the slough as much
" as those banks will hold; isn't it at the same time out
" in the tules?
" A—No, sir; it cannot go out if it is only full to the
" top of the banks.
1366 " Q—Well, do you know that you have ever seen it
" that way?
" A—I could not find no water outside of it if it was
" running down inside the banks.
" Q—Have you ever seen it when you were crossing
" the channel in that way—the way you speak of? Have
" you ever seen it in that condition at all when it was not
" out in the tule?
" A—When I would swim; have to swim these places;
" why, it would be bank full and running out and spread-
" ing over in the swamp.
" Q—Have you ever seen it when it was just bank full?
" A—No; not from one end to the other.
1367 " Q—What I mean to get at is this: After that shal-
" lows out and spreads out and it is in holes; when the
" shallow places that you speak of —
" A—[Interrupting]—Low places.
" Q—The wide channel fills up before they fill up.
" Can any water get into the tules clear through, I mean;
" not in one place?
" A—Oh, I don't think it was clear through. I think
" it would find some places where it would run over. I
" think at different times it was run over and spread out
" into the swamp.

T., II, fol. 1360-7.

" *Ever since I have*
" *known Buena Vista Slough, I suppose it has always*
" *got the major part of its supply of water from Kern*
1375 " *River; that is, the main part of the the water that empties*
" *into that slough and the lake. I have found always*
" *that Kern River carries its waters into Buena Vista*
" *Lake, Kern Lake, and into the slough; those three*
" *points.*

" Q—*Where is the first place that the water comes*
" *from that goes into Buena Vista Slough, at the pres-*
" *ent time?*
" A—*It comes from Kern River.*
" Q—*Sir?*
" A—*At the present time it gets its water from Kern*
" *River.*
1376 " Q—Well, you have already stated that the water
" from the south fork and middle fork ran into Buena
" Vista Lake until the lake filled up?
" A—The old south fork empties into the slough, and
" follows the slough up into the lake.
" Q—Hasn't it got its supply of water from Buena
" Vista Lake?
" A—Well, when the water ran into Buena Vista
" Lake and Kern Lake, of course when the lakes were
" full it run out down out Buena Vista Slough.

T., II, fol. 1374–6.

"
"

RE-DIRECT EXAMINATION.

1378 " Q—*When water was running down the South Fork*
" *of Old River, into Kern and Buena Lakes, after*
" *the lakes were filled, where would the water go?*
" A—*Down Buena Vista Ditch or Slough.*
" Q—*Down Buena Vista Slough?*
" A—*Yes, down that channel.*
" Q—*When the waters run from these lakes to the*
" *branches you speak of running out of New Riaer,*
" *where would the waters escape after the lakes were*
" *full?*
" A—*After they would fill up the lakes, it would go*
" *down to Buena Vista Slough. I don't know of any*
1379 " *other outlet.*
" Q—*At any other time when these lakes were filled,*
" *Kern and Buena Vista, the waters would run out down*
" *through Buena Vista Slough?*
" A—*They would run down out through Buena Vista*
" *Slough. There is no other resource that I know of.*
" Q—*You state that when the Buena Vista Slough*
" *was full and overflowing, it would overflow its banks*
" *at low places, the same as Kern River?*
" A—*Yes, sir.*
" Q—*Have you ever seen Kern River during the*
" *floods, when it would overflow its banks?*
1380 " A—*I have seen it overflow this whole valley, very*
" *nearly.*

" Q—*Take the usual spring freshet, along the New*
" *River, when the waters were running down from the*
" *melting snows, does that river overflow its banks at low*
" *places?*
" A—*Yes, sir.*
" Q—*Is that so every time that the river is running*
" *down in the spring season?*
" A—*Whenever it comes a spring raise there is places*
" *it will spread out and get out of its banks; low banks.*

T., II, fol. 1378–1380.

George Racine, for plaintiff, a stock raiser, first went to Buena Vista Slough in 1859 (T., II, fol. 1234); next in the spring of 1863 with cattle (fol. 1235–6); again in the spring of 1864 (fol. 1236); again in the spring of 1865.

" I next went to the slough in 1865, in
" the spring of the year. I struck the slough at that
" time at Tulare Lake, and went right on up the slough as far
" as Tracy's Crossing, the old crossing on the slough. I
" have been around through there. I don't remember
" exactly; we were hunting cattle, and prospecting the
" country; hunting up cattle. I was going up the
" slough at that time and crossed the slough. I
" do not know, I could not tell how many times; too
" numerous to mention; I could not say.
1238 " Q—At how many different points did you cross the
" slough after going up there?
" A—Well, I could not tell that; but a good many
" though.
" Q—What was the condition of the water in the
" slough at that time?
" A—There was no water; that was in 1865. After
" going to Tracy's Crossing I went back the same way. I
" might have been seven or eight days making the trip
" back. I was crossing the slough also at that time,
" backwards and forwards.

T., II, fol. 1237–8.

Next there in 1867, and from Tulare Lake to Tracy's Crossing and back again down the slough (fol. 1239–40). Again in March or April, 1868, gathering cattle (fol. 1240).

Again in 1869 (fol. 1241);
Again in 1870 (fol. 1242);
Again in 1871 (fol. 1242);
Again in 1872 (fol. 1243);
Again in 1873 (fol. 1244);
Again in 1874 (fol. 1245-6);
Again in 1875 (fol. 1247);
Again in 1876 (fol. 1248);
Again in 1877 (fol. 1249);
Again in 1879 (fol, 1252);
Again in 1880 (fol. 1254);
Again in 1881 (fol. 1256.

After showing by this witness that he had been on that land along Buena Vista Slough, in charge of stock, during the years 1863-4, and every year from 1865 to 1881 (except the single year of 1878), running with stock from Tulare Lake to Buena Vista Lake, and crossing the slough at all points, the witness continues:

" I
" could not say at how many different points I have
" crossed the slough running through that swamp land
" during the time that I have been on it.
" Q—Do you suppose you were on every section of
" land that it runs through?
1258 " A—Very nearly it, I think.
" Q—What kind of a channel is it that runs down
" through that body of swamp and overflowed land from
" Buena Vista Lake to Tulare Lake?
" A—It is a well defined channel.
" Q—How deep upon an average?
" A—I could not say how deep; *in places where there*
" *are steep banks, such as there is from Buena Vista*
" *Lake down to Norton's Camp, or at the Wible Camp,*
" *some places there it would be eight or ten feet deep,*
" *the banks, and in some places less. Some places below*
" *before we get to Weed Island, was very steep banks,*
1259 " *eight or ten feet high. Then you came to the banks*
" *that are sloping banks, and the water would not be*
" *over five or six feet. In some places it would be fifteen*
" *or twenty feet deep. It runs on in that way clear*
" *through.*

T., II., fol. 1257–59.

This witness was not cross-examined.

THOMAS L. BRIGGS, for plaintiff: First on Buena Vista Slough in the spring of 1864; drove a lot of cattle over there (T., II, fol. 1090–1), and again in 1866, "getting up" cattle (fol. 1092). There again in 1874, for about a month (fol. 1093). Again in 1875, gathering cattle; was there two or three weeks (fol. 1097). He says:

" Q—What distance would you have to swim in making
" these crossings in 1875?
" A—Various. Outside in the sloughs, in some places,
" as I said before, some wider.
" Q—Was it about the same as 1874, so far as the
1099 " swimming was concerned?
" A—I think the water was a little higher that year,
" 1875. *During that season I crossed the slough three*
" *or four times a day; we were working in the swamp at*
" *that time. I crossed about as many times as I had done*
" *on the other trip; about as often as I did before. That*
" *would be three or four times a day. I was working in*
" *the swamp all of that time. In* 1875 *we would not go*
" *clear across; we went in on the islands. When I com-*
" *menced gathering cattle I had to go clear across.*

T., II, fol.1098–9.

Was there again in 1876, with cattle, and remained pretty nearly all the year (fol. 1101). Was there again, with cattle, in 1877, and remained there pretty nearly all the time (fol. 1103). Was on Buena Vista Slough in 1878, 1880 and 1881 (fol. 1104).

After he had testified to this intimate acquaintance with the Buena Vista Slough country, the witness is asked:

" Q—*Now, Mr. Briggs, from the time you went on that*
" *slough in* 1864, *until this year, when you have been*
" *passing up and down the slough, crossing it, what have*
" *you found in that slough in the way of a channel to*
" *carry water?*
1106 " A—*I found it a very well defined channel between*

" *Buena Vista Lake and Tulare Lake—that distance be-*
" *tween those two lakes.*
" Q—Is there a channel defined there that would carry
" water?
" A—Yes, sir.
" Q—*How deep is that channel upon the average?*
" A—*From four to twenty feet deep—various depths.*
" Q—*How wide?*
" A—*From twenty yards to one hundred yards, in*
" *places.*
" Q—When you have been on that slough there, and
" there has been water in the channel, has it been
1107 " running?
" A—Yes, sir.
" Q—*Has it had a current?*
" A—*Yes, sir.*
" Q—*In what direction?*
" A—*North.*
" Q—*Has this current always been in that direction?*
" A—*Yes, sir.*

T., II, fol. 1105–7.

" Q—Can you start from the Tule House and follow the
" bend of that slough down to Tulare Lake?
" Defendant objects to the question as leading.
" Objection overruled.
" A—Yes, sir.
" Q—Can you follow that slough from the Tule House
" up to a point on Goose Lake, the head of it?
" A—Yes, sir.
1144 " Q—*How far can you follow the bed of that slough*
" *going south from a point west of Goose Lake?*
" A—To Kern Lake.
" Q—To what lake?
" A—*Buena Vista Lake.*

T., II, fol. 1143–4.

1145 " Mr. Flournoy. *Did you ever follow the slough up in*
" *the way you stated you thought you could do?*
" A—*I think I can do it; I have never done it. I have*
" *been on all parts of it. I think I can do it.*

T., II, fol. 1145.

" R. B. Still, for plaintiff, testified:
" " Q—Do you know a stream known as Buena Vista
" Slough, which runs from Buena Vista Lake into Tulare
" Lake?

" A—Yes, sir; I do.
" Q—When did you first visit that slough?
758 " A—In 1874; I was there working with cattle for Cox
" and Clark; when I first went to it I struck the slough
" at a point about opposite the Tule House; about oppo-
" site the Tule House; that Tule House is about 10 miles
" south from where Lake Tulare is now; after striking
" the slough we worked along south up Buena Vista
" Slough; we were on the west side; we worked up to
" where the bridge is now, and crossed there; I refer to
" the only bridge on the slough; it is near the point of
" hills, and I should think about 8 miles to Buena Vista
" Lake.
759 " Q—What was the condition of that slough when you
" crossed it?
" A—It was full of water."

T., II, fol. 757-9.

Next visited the slough in September, 1874, and again worked up the slough on the west side, and crossed at the same point and worked down the slough on the west side. (T., II, fol. 760.) Was again on the slough in April, 1875, from Tulare Lake to the same crossing near Buena Vista Lake.

" *I was along that slough during* 1875, *almost all the*
" *time until August, working and camping along in*
" *various places between Buena Vista and Tulare*
" *Lakes.*
" *We were going the whole distance between the*
" *lakes. That season we crossed the slough at different*
" *points. Crossed it several times. It was full of water.*
763 " Q—*In crossing, how would you make a crossing?*
" A—*We would swim it. I think I remained there with*
" *the stock six months. During all of that time I was*
" *along the slough with cattle.*

T., II, fol. 762-3.

Was there again in February, 1877, with cattle "I
" was there from the first of February, 1877, the most
" of the time until January, 1878; a part of the time
" I was pumping water for Cox & Clarke." (T., II, fol. 764.)

He was on the slough off and on during the whole year, 1878, working with cattle. (Fol. 766-7.) There again in January, 1879, and there frequently during 1879, working with cattle. (Fol. 768.) Was there working with cattle the most of the year 1880, (fol. 769.)

The witness then continues:

770 " *From the time*
" *I went there in* 1874, *up to the close of the year* 1880,
" 1 *should think I hnd crossed that slough a thousand*
" *times. I think I have crossed it on every quarter sec-*
" *tion on the swamp.*
" Q—*I will ask you if in crossing that land you found a*
" *water channel all of the distance between Buena Vista*
" *and Tulare Lakes?*
" A—*Yes, sir.*
" Q—*I understand you that you have crossed it on*
" *every quarter section going through the swamp?*
" A—*I think I have been on every quarter section in*
771 " *the swamp; that is from Wible's Camp down across the*
" *slough between Wible's Camp and the crossing above.*
" Q—Did you ever cross the slough from Mr. Wible's
" Camp up at any point between Wible's Camp and the
" crossing?
" A—*Yes, sir; I have crossed it above Wible's Camp.*
" *Between Wible's Camp and the crossing it was a deep*
" *slough?*
" Q—When you have been on that slough and the
" water was running in it between the years 1874 and '78,
" what way would the water be running?
772 " A—Running north.
" Q—Always?
" A—I never saw it running any other way.

Tr., II, fol. 770–2.

Robert Burgan, for plaintiff, an employee of plaintiffs on Buena Vista Slough, first went to Buena Vista Slough in the spring of 1865, working with cattle; was there for a month or two and in the fall again for the same length of time.

"I was working from the head of Tulare Lake to
" Tracy's Crossing, and I was crossing the Slough at
" different points."

T., II, fol. 1733–4.

* * * * *

" When I was there in the early part of
" 1876, I was working with cattle. I was working from
" Tulare Lake up to Tracy's crossing, and I was cross-
" ing the slough at that time. I crossed it quite a num-
" ber of times that year.
" Q—At how many different points?
" A—I crossed it most of the time, down at the Tule
" House. It was in March, 1879, I think, that I went
" there again. I think the first work I did was putting
" in a pump; I think it was in April. I don't know how
" many pumps I put in myself; but I think I had seven
" put in.
1737 " Q—Had seven pumps put in?
" A—I had five put in, I was working for Mr.
" Crocker,
" Q—What were they using the pumps for?
" A—Watering stock and cattle. The condition of
" the water in the slough at that time was very low.
" Q—How long did you remain there after March,
" 1879?
" A—Well; I was there and away from there pretty
" much all of the time during the winter, and lately a
" few times backwards and forwards.
" Mr. McAllister. I don't hear what you say.
1738 " A—I was there most of the time backwards and for-
" wards, attending to the cattle and pumps, during 1879,
" and pretty much all the winter. I was there in the
" year 1880.
" Mr. Houghton. What were you doing there in
" 1880?
" A—I was running one or two pumps along earlier,
" working with cattle—rodeoing—gathering stock and
" branding cattle. I was working cattle between Tulare
" Lake and Tracy's Crossing. I crossed the slough a
" number of times.
" Q—Who were you working for then?
1739 " A—I was at work for Mr. Crocker."

T., II, fol. 1736–9.

The witness is then examined generally as to the slough from Buena Vista Lake to Tulare Lake.

" Q—*Have you ever seen the water running all the dis-*
" *tance from Buena Vista Lake to Tulare Lake?*
" A—*I think I have in* 1876.
" Q—*What was the condition of the channel?*
" A—*I didn't see it running all of the way, but I seen*

" *it whenever I was on the slough running, and I sup-*
" *pose I was on the slough at* 50 *or* 100 *different places.*
1743 " Q—When in crossing the swamp land there along
" the slough at those places did you always find the
" slough?
" A—*Where I cross I always find sloughs.*
" Q—What was the condition of that water in the
" slough?
" A—That year it was always swimming when I found
" it. They were swimming where I crossed them. The
" water was running where I found it in these sloughs;
" running north.
" Q—*What is the average size of that slough — the*
" *main slough from Tracy's crossing down to the Tule*
" *House?*
1744 " A—*It would average* 80 *or* 100 *feet.*
" Q—*How deep will the water run in it as a rule be-*
" *fore it overflows its banks?*
" A—*Well, where I generally made my crossings it*
" *would be about* 6 *feet; where I generally made my*
" *crossings.*
" Q—*Then at the lowest place, about what would be*
" *the average.*
" A—*Where I have been on the slough the lowest*
" *place would be* 2 *feet; that would be the shallowest*
" *place on the slough in the channel.*

T., II, fol. 1742-4.

This witness was not cross-examined.

J. M. Lewis, for plaintiff, foreman of Cox & Clark: First went to Buena Vista Slough in 1862 with horses and stock. (T., II, fol. 1038.) Again, in the spring of 1863, gathering cattle (fol. 1040). Again, in 1866, when he first goes all the way up Buena Vista Slough to Tracy's crossing.

" I came back to the slough next,
" I think, in 1866; I was not there from 1863 to 1866;
" I came back in 1866, there, to help some parties gather
" cattle and brand calves and such like. We struck the
" slough down at the west corner of Tulare Lake; we
1042 " were on the west side of the slough, right at the edge
" of the lake. From there we worked up to Buena Vista
" Slough, up to Tracy's crossing; I suppose we were
" ten or twelve days going up there; I mean the old

" Tracy crossing on Buena Vista Slough, during that
" time we were camped along the slough. After crossing
" at Tracy's crossing we went on down on the east side.
" We forded at the Tracy crossing; I think that was in
" June. There was considerable water there at that
" time; it was running northwardly to Tulare Lake.
" After crossing we worked down on the east side of the
1043 " slough to Tulare Lake. I presume we were about the
" same time going down that we were coming back—ten
" or twelve days—perhaps not so long. We were camp-
" ing along on the slough. During that trip I did not
" cross the slough at any other point except Tracy's
" crossing.
" Q—What was the condition of the water along the
" slough as you went up on the west side and down on
" the east?
" A—There was considerable water on the sloughs.
" The sloughs were full.
" Q—Was it running all of the distance to Tulare
1044 " Lake?
" A—Yes, sir; there was water running at that time.

T., II., fol. 1041-4.

Was on Buena Vista Slough again in 1871 with stock (fol. 1044-5); again, in the spring of 1876 (fol. 1045), and in September, 1876, and was there off and on all that fall and winter attending to cattle (fol. 1046-7); was again there the most of the year 1877 (fol. 1047), and in 1878 (fol. 1048), and in 1879 (fol. 1049).

" Q—What is the nature of the channel where you
" crossed it above and between Goose Lake and Weed
" Island or Tracy's Crossing?
" A—It seems to be mostly confined to the channel; I
" have noticed whenever I have crossed it that it seemed
" to be a deep channel. confined channel; it seemed to
" be a well confined channed where I crossed it.

T., II, fol. 1056.

" Cross-examination of
"
" J. M. Lewis.
" To Mr. Garber. Q—What years did you say, Mr.
" Lewis, that you were on that slough?

" A—In 1862 was the first time I crossed there; I was
1059 " back there again in 1863 and 1866, and 1876 and 1877,
" and from then on, more or less, all of the time.
" Q—1877, and ever since?
" A—Yes, sir; all of my work has been there since; I
" have been at work nowhere else, only at my head-
" quarters, and at my headquarters about Poso Creek,
" that is close to the slough, some ten miles away; I have
" been working for Cox and Clarke.

T., II, fol. 1058-9.

W. W. HUDSON, for plaintiff, first came to Kern County in 1859, with Gen. Beale, and went into Government employment as chief herder. (T., II, fol. 179).

After describing the course of Kern River to Kern Lake and the slough between Kern and Buena Vista lakes, he testifies:

" Q—What effect did the flood in 1862 have upon the
" waters of the South Fork channel?
" A—Very little. The waters separated, and a por-
" tion of them ran through what was called Old River,
184 " into Buena Vista Slough. What I mean by Buena
" Vista Slough, is the slough between Kern Lake and
" Buena Vista Lake.
" Q—*After that division and before, when the water*
" *was running through South Fork, or South Fork and*
" *Old River, where would the water then continue on to?*
" A—*It continued on to what is called Buena Vista*
" *Slough.*
" Q—*And from there?*
" A—*And from there to Tulare Lake, down through*
" *Buena Vista Slough?*
" Q—When were you first to Buena Vista Slough that
185 " you speak of, running out of Buena Vista Lake?
" A—I think I was there, sir, in 1859, and perhaps in
" 1860, or in 1861. I know I was there in 1861. I can't
" remember when I was there last, in 1872 or 1873.
" Q—*Was there any change in that slough between*
" *the time you first went there in* 1859, *and the time*
" *you were last there in* 1872 *or* 1873?
" A—*No material change.*
" Q—*The channel is the same now as it was then?*
" A—*Yes, sir. I drove a great deal of stock through*

" *there from* 1862 *to* 1872 *or* 3. *I think I made my last*
" *trips, perhaps, in* 1872. *In driving stock you drive it*
186 " *on the west side of Buena Vista Lake, and thence on*
" *the west side of Buena Vista Slough to Tulare Lake,*
" and on the west side of Tulare Lake, to what is known
" as Fish Slough, or the outlet of Tulare Lake. Thence
" down the San Joaquin to Pacheco Pass, and by Gil-
" roy to San Jose.
" Q—*Then in driving from Buena Vista Lake to*
" *Tulare Lake, you would follow that slough?*
" A—*Yes, we followed the slough, in order to get wa-*
" *ter and camp. In following that slough we found*
" *water all the way down through always. The water*
" *would be lower in dry seasons. You know the ex-*
187 " *tremes in California.* In flood there is an im-
" mense quantity of water. The slough appears to con-
" fine itself to the high ground; on the southwest side,
" there was more alkali and more sand, and the water cut
" more of a channel there. In high water it overflowed;
" I don't know to what extent. In high water it would
" overflow, all of the swamp and overflowed lands. It was
" in 1864, that I went through the slough between Kern
" and Buena Vista Lake and reversed it. I was in
" company with General Beale and Robert S. Baker.
" Q—*How many times between* 1859–60 *and* 1873 *did*
188 " *you go from Buena Vista Lake down Buena Vista*
" *Slough to Tulare Lake?*
" A—*I could not enumerate that, sir. I drove a great*
" *deal of stock, sometimes once, and sometimes as often as*
" *three times a year, from* 1862 *to* 1872.
" Q—*You drove along Buena Vista Slough from Buena*
" *Vista Lake down to Tulare Lake?*
" A—*To Tulare Lake.*
" Q—*Did you always find a slough there when you*
" *went down?*
" A—*Yes, sir.*
" Q—And you always found water?
189 " A—Always found water for camping purposes; some-
" times it would be lower than others.
" Q—How was it about finding a running stream there
" usually or not?
" A—Well, sir, there was a current. It was very
" gentle in places, where the slough had cut down and
" was narrower, there was considerable current, where
" it had been spread out and the tules had grown up and
" it was dead water, or comparatively so—yet there was
" a current. *I last saw Buena Vista Slough between*
" *Buena Vista Lake and Tulare Lake; in* 1873, *I think.*

" Q—*Wh n you saw it last, was the general course of*
190 " *that slough, the water running through the same chan-*
" *nel as it was when you first saw it?*
" A—*Yes, sir.*
" Q—*There was no change?*
" A—*No, sir. No material change. The water was*
" *at the same points.*

T., II, fol. 184 to 190.

" CROSS-EXAMINATION.
"
" By Mr. GARBER. I have been here twenty-one years,
" since 1860. During the last years I have not been so
193 " familiar with the country. From 1859 to 1880 I was
" familiar with this stream of water in this country.
" Q—*And your business during that time took you*
" *through this country along the Buena Vista and Kern*
" *Lakes and Tulare Lake a good deal?*
" A—*From '62 to '72, consecutively.*
" Q—*About ten years?*
" A—*Yes, sir. For eight years I ain't seen the slough*
" *so frequently.*
" Q—But still sometimes?
" A—Sometimes.

T., II, fol. 192–3.

" Q—You noticed no change during that period of
" time in the way in which that water ran through those
" lakes in that part of the country?
" A—Not as I know of, sir.
" Q—During that time there seemed a current, as
" there always had been?
" A—No, sir. It was owing to the season. There is
" more or less current.
196 " Q—But one season with another, during those ten
" years, it was always about the same?
" A—As well as my memory serves me, it was.
" Q—Which way was the current?
" A—Towards Tulare Lake, and from Kern Lake to
" Buena Vista Lake, as near as I recollect.

T., II, fol. 195–6.

" Q—Well, Captain, what time of the year is it that
" the water is highest through that slough, as a rule?
" A—Generally from January to June.
" Q—*Well, during that period of each year, was there*
210 " *always a great deal of water in Buena Vista Slough*
" *every year that you were there?*

" A—*When there was not a drought, sir.*
" Q -Well, what year was there that there was a
" drought, that you recollect?
" A—I can't enumerate them.
" Q—How many of them were there, that you re-
" member?
" A—*In* 1863–4 *we had a very severe drought.*
" Q—*Was there any water in that slough then?*
" A—*Yes, sir.*
211 " Q—*How much in the lakes, Buena Vista and Kern*
" *Lakes, at that time?*
" A—*About the usual quantity.*
" Q—*They were full?*
" A—*They have varied very little in the* 21 *years*
" *that I have been acquainted with them.*
" Q—*They are always full, whether the year is dry*
" *or not?*
" A—*There is always a sufficiency of water from the*
" *snows and Kern River to supply these lakes. They*
" *filled up usually, before the ditches were taken out,*
" *and the absorption by evaporation and irrigation. I*
212 " *don't think they have varied more than two feet.*
" Q—Leaving out these years of drought, do you say
" that there was always a large body of water in Buena
" Vista Slough every year when you passed there from
" January to June, when it was highest—when the water
" was highest? I speak of the time in the year when
" the water was highest, with the exception of these
" years which you say were dry years. *Was there always*
" *a large body of water every year in the slough?*
" A—*Sufficiently large to prevent our crossing it with*
" *stock.*

T., II, fol. 209–212.

C. W. Clarke, of Cox & Clarke, who has owned land and been in the cattle business on Buena Vista Slough since 1857 (T., II, fol. 1146), was first on Buena Vista Slough in May or June, 1865, for nearly a month, gathering cattle, and worked all the way up to Tracy's Crossing (T., II, fol. 1146–7). He continues:

" Q—What ,was the condition ,of the water in the
" slough at that time?
" A—Perfectly dry.
" Q—You crossed the slough at that time while you
" were there, did you?

" A—I have crosse it; well, I came right up the swag,
" following it right up there.
1148 " Q—What do you mean by the swag?
" A—Well, where the channel comes down here; a
" watercourse. That was the best traveling at that time;
" it was better than on the outside; there was more
" alkali and soft ground, and the lizards and these little
" squirrels and things. The ground on the outside
" was kind of boggy in places. In there it was solid, and
" better traveling. I remained there about a month."

T., II, fol. 1147–8.

He was there again in the fall of 1865, for a month, rodeoing (T., II, fol 1148), and again in the spring of 1876, in all about thirty days (fol. 1149), and then again in the spring of 1867, gathering cattle for twenty-five or thirty days (fol. 1152); again in March, 1869; again in April or May, 1869. Not there again until 1873 (fol. 1155); again there in the fall of 1874, making surveys (fol. 1160–1–2; again there in 1874, but didn't do as much (fol. 1163); again in 1875, building a fence (fol. 1163 and 1197); again there in the spring of 1876 (fol. 1167); and again in the fall of 1876 (fol. 1168).

The witness then testified:

" Q—*I understand you to say that you have been,*
" *during the different times you have been down there,*
" *along Buena Vista Slough, from one end to the other, be-*
" *tween the two lakes?*
" A—I *have been about as far as Tracy's crossing; about*
" *three miles of what is called the dam.* I have not been
" up to Buena Vista Lake. I have been up to the lake,
1171 " but not right at the point. The dam I refer to is the
" Baker dam.
" Mr. Houghton. What is the condition of that slough
" from Tracy's crossing, at the point you said you had
" been, to the point opposite Goose Lake?
" A—Well, the time I went up there, in 1865, it was
" very dry, and we went right up; we crossed to the water-
" course, and we went up to Tracy's; and the water was
" standing in holes there. It was full of fish—very full of
" fish. The watercourse was then dried out, with the ex-
" ception of a few low places.

" Q—*What was the condition of that water channel that*
1172 " *you followed up from Goose Lake to the Tracy crossing?*
" *What was the width of it?*
" A—*The channel was very plain.*
" Q—*The average width?*
" A—*The channel was very plain; no trouble about a*
" *man following it up. I could not say what the average*
" *width of it was, because it would run along—it was cut*
" *up in different shapes. I suppose in places where it was*
" *confined it was from* 75 *to* 100 *feet; in other places it*
" *would spread out* 100 *to* 200 *feet, wherever there was*
" *washouts; that is, the bed, the place where the current*
" *ran.*

T., II, fol. 1170–2.

Elisha Stevens, a witness for plaintiff, 77 years of age, who first came to Kern County in 1844, one year ahead of Fremont (T., II, fol. 132–3), and camped on Kern Lake in 1845, testified to having been in a canoe on Buena Vista Slough from Buena Vista Lake down to where Kern River emptied into the slough, and that he continued in the canoe down the slough for 15 miles to the drift pile, testified to by every witness who was familiar with Buena Vista Slough.

He testified:

" I myself ran up
" with the canoe to the mouth of New River, and then
" turned north with it down the river, and then came
" back and run up New River with the boat, or canoe, I
" called it.
137 " Q—That river that you speak of running down there
" is what is now known as Buena Vista Slough?
" A—Do you mean —
" Q—You say you ran with a canoe down the river to
" the mouth of New River? Was that along Buena Vista
" Slough?
" A—Yes, sir.
" Q—How far did you go down?
" A—*I went in the canoe down that slough about fifteen*
" *miles, I think. It was deep and crooked, and not very*
" *wide. In some places it was wide and deep. I went*
138 " *about* 15 *miles. There was a big drift of red wood that*
" *blocked me out with the canoe; and I could not pass at*
" *all.* The tules grew up in every direction. I looked be-
" yond, but I could not travel any further with my canoe.

" Q—What year was that you went down there?
" A—That is another date I can't tell, but it was after
" the last flood.

T., II, fol. 136–8.

On cross-examination:

157 " Q—From what point did you run up in the canoe?
" A—I told you I came up the stream and then turned
" around. I called it the summit of the river. The river
" ran to the foot-hills (New River), and then divided its
" waters, and part went south and part north. That is
" what they call New River now.
" Q—When was that, that you ran up New River in
" your canoe?
" A—I told you about 8 years ago, the last time I was
" down. I ran up the river about two miles, I think, near
" three miles up New River.
" Q—From Buena Vista Slough?
158 " A—I went from Buena Vista Slough up to the mouth
" of New River. I ran up to what I call the Summit, at
" the mouth of New River, about 15 miles, and then came
" back and ran up about 3 miles and landed on the south
" side.
" Q—*At that time where was the water that was run-*
" *ning in New River discharging itself?*
" A—*Some into Kern and some into Tulare Lake.*
" Q—*Some of it was being discharged into Tulare Lake*
" *at that time?*
" A—*Running that way. I did not go to where it*
" *stopped.*
159 " Q—Where was the balance of it discharging at that
" time—that came down New River?
" A—I drank some of it.
" Q—Where was the balance of it discharging itself at
" that time?
" A—There was no other discharge—there was no other
" place for it to go.
" Q—You say part of it ran down toward Tulare Lake?
" A—I understand you. I will tell you once more.
" When New River cut through it ran to the foot-hills and
" it divided.
" Q—Where did it divide?
160 " A—At the mouth of New River.
" Q—About how far from Buena Vista Lake did that
" New River divide the waters of New River?
" A—I never measured that, but it is over two miles.

" There is a place down there that is called Baker's Dam,
" at the south end of Buena Vista Lake. It ain't much
" over two miles where the New River—
" Q—There is where the waters divide?
" A—That is where the waters run into the slough.
" Q—Part of the waters run into Tulare Lake?
" A—Yes, sir.
161 " Q—Where did the other part go? Did the other
" part go to Buena Vista Lake? Part of it ran into
" Buena Vista Lake and part of it into Tulare Lake?
" A—I ran up the stream with my boat. The water, I
" suspect, must have run south.
" Q—*You ran about two or three miles up the New*
" *River above the slough?*
" A—*When I came back on the north end I went down*
" *about* 15 *miles, and I came back to the mouth of New*
" *River and run up about* 3 *miles. That was in the spring.*
" *The water was at an ordinary stage. Not as high as it*
" *is now. It was pretty near. The water was flush. I*
162 " *don't know whether there is more water now or not.*
" *The water was just flush. It was a strong river. I was*
" *mighty tired trying to get up it.*

T., II, fol. 157 to 162.

" Q—I want to know whether you mean to say—I sim-
" ply wish to know if you mean on that occasion you rowed
" your boat from Buena Vista Lake up two miles above the
" junction of New River with the Buena Vista Slough?
" A—I rowed from Buena Vista Slough up to the mouth
" of New River and was going up stream then; and then
" when I came to the mouth of New River, I ran on.
" Q—Up the New River or down to Buena Vista
" Slough?
169 " A—In an old slough which was then running north
" and part of it south.
" Q—After you got up to the mouth of New River, do
" you mean to say that you went down to Buena Vista
" Lake with your canoe?
" A—I went to New River.
" Q—Then did you go to Buena Vista Lake in your
" canoe?
" A—I went from Buena Vista Lake up to the mouth,
" and then went north. Then I went back to the mouth
" again and ran on 3 miles."

T., II, fol. 168–9.

ALEXIS GODEY, for plaintiff, a resident of Kern County since 1853, and who came to California with Fremont, was on Buena Vista Slough first in 1858; "was up and along it at different times." (Tr., II, fol. 127.) Was on the slough in September, 1866, half way between Tulare and Buena Vista Lakes and crossed it higher up, and at Tracy's crossing (fol. 126–7.)

" Q—Was there any change in the slough in 1858 up
" to the time you saw it last in 1866?
" A—No, sir; there could not be any change.
" Q—The slough continued to run where it did and
" about the same width?
" A—Yes, sir; I think if you would turn as much water
" in there now as there was at that time, it would run just
" the same as it did at that time. There is nothing, that
129 " I can see to change it.

T., II, fol. 128–9:

J. PENSINGER, who has resided in Kern County since 1873; testified to going down Buena Vista Slough in a flat boat sixteen or eighteen feet long, and six or eight feet wide, from Tracy's Crossing, which is on Sec. 24, T. 30 S., R. 24 (T., II, fol. 928–9), six or eight miles, which must have taken him down to about the "drift pile," where Crocker says he afterwards found the boat. (T., II, fol. 730–1.)

He says:

" I have been on Buena Vista Slough;
" first in 1872, I crossed there living at Santa Barbara.
1272 " I crossed in a wagon—forded. I was there again the
" same year and crossed; crossed it that time in a wagon.
" *I saw a ferry-boat there. I don't know whether it*
" *was a ferry-boat or not. That was in December of*
" *the same year,* 1872. *I could not tell you how large it*
" *was; it was* 16 *or* 18 *feet long and* 6 *or* 8 *feet wide. It*
" *was a kind of a scow.* I found it sunk there in the
" slough. I hauled it out of the slough with my mules
" and then cleaned it and caulked it, and then I started
" down the slough.
" Q—*How far down the slough did you get with the*
" *boat?*
" A—*Well, I don't know exactly;* 5 *or* 6 *or may be* 8

1373 " *miles. I started from between Tracy's Crossing and*
" *camp; that was in December,* 1872.
" Q—*After going down* 6 *or* 8 *miles, what did you do*
" *then?*
" A—*I tied the boat up and left it there?*
" Q—*Why didn't you take it back?*
" A—*The current was so strong, I could not tow it*
" *back. I went no further down the slough at that time.*

T., II, fol. 1271–3.

JOHN BARKER. We call special attention to the testimony of the witness, John Barker, a stock raiser, residing on Kern River, and who first visited Buena Vista Slough in 1854 (T., II, fol. 303).

This witness visted the slough on hunting expeditions in 1854–5 (T., II, fol. 303–4–7), and three times with W. F. Montgomery, in 1856; first in August or September, and next in October or November (T., II, fol. 310–317), and again for "further explorations and verifications" with Mr. Montgomery and others in 1857. The four last trips were made for the sole purpose of examining the slough with a view of ascertaining whether or not there was a channel from Buena Vista Lake to Tulare Lake.

He says of these trips made with Mr. Montgomery:

" *I next visited*
" *Buena Vista Slough in* 1856; *I went up there with*
" *W. F. Montgomery to look at the slough, to examine*
" *the water connection between the lakes.*
" Q—*Between what lakes?*
" A—*All of them: Tulare, Buena Vista and Kern.*
" Q—Did you make such an examination, do you re-
" member?
" A—We did.
311 " Q—Go on and state in connection with that examin-
" ation between Tulare Lake first, and Buena Vista.
" A—Well, we went up there. I can explain the rea-
" son why I went up there if you wish. *I*
" *went up there with Mr. Montgomery. He went*
" *there on the representations I had made to him*
" *about the water connection, to examine it, and test*
" *the feasibility of the project of constructing a canal up*

" *there. We went there for that purpose, to examine*
" *the slough and connections between the lakes all of*
" *the way along.*

T., II, fol. 310–311.

" Q—*In following through there how wide did you find*
" *the stream of water?*
" A—*In following through there between Tulare and*
315 " *Buena Vista Lakes—the first slough is the one I am*
" *speaking about. At the places where I saw it at the*
" *time I should think it must have been 30 or 40 yards*
" *wide. There was a current at the time, and it was set-*
" *ting down towards Tulare Lake.* After getting up to
" Buena Vista Lake, I went on to the channel between
" Buena Vista and Kern Lakes at that time. We found
" there a running stream of water going down there into
" Buena Vista Lake. At that time I went to the point
" where Buena Vista Slough leaves Buena Vista Lake.
" I think the water was running there. It was running,
" I know, a short distance below. I could not say how
316 " much was running; but there was communication all
" the way through.
" Mr. GARBER. How is that? I did not hear.
" A—I say I could not say whether it was running or
" not right there; right where it leaves the lake, and
" there was an open water communication; and it was
" running below.
" Mr. HOUGHTON. Q—*Was there an open water com-*
" *munication all of the way between Buena Vista Lake*
" *and Tulare Lake?*
" A—*Wherever I could get to it or see it, there was.*
" I was up there on Buena Vista Slough again in 1857.
317 " I was in fact up there again the same year, a second
" time in 1856; still later in the fall in company with
" W. F. Montgomery again. It must have been in Oc-
" tober or November.

T., II, fol. 314–317.

" Q—What were you doing ou Buena Vista Slough?
" A—Well, I was making further explorations or veri-
" fications. There were parties with us to whom these
" representations had been made by Mr. Montgomery
" and myself; and we wanted them to see. That was in
321 " 1857.

T., II, fol. 320–1.

And on cross-examination:

" Q—*What would be the object in these crossings?*
" A—*When I went with Mr. Montgomery, the object*
353 " *was to discover whether there was an open channel of*
" *water connecting the lakes; Tulare and Buena Visa*
" *Lakes.*
" Q—*Was there a swift current?*
" A—*As I have described before, I should think from*
" *1 to 2 knots an hour. We did not go up in a boat or*
" *anything of that kind.*
" Q—*The object was, as I understand, whether there*
" *was a current?*
" A—*Whether there was a channel of water; we were*
354 " *not looking for a current particularly. That was in*
" 1857.
" Q—You made the same crossing in 1858?
" A—That was in 1856 I made the first trip with Mr.
" Montgomery.
" Q—Then you made the same crossing in 1857?
" A—Very similar, I think. I cannot state that they
" were the same. We went up again in 1857?
" Q—What was the object in 1857?
" A—It was the same object. There were parties with
" us to whom these representations had been made from
" knowledge gained in the former expedition, and we
" wanted them to see it.

T., II, fol. 353–4.

In 1858 he was again on Buena Vista Slough, hunting—July (T., II, fol. 323–4), and in 1859. Of these trips he says:

" It was in the summer time. I was with
" the same party of hunters I have spoken of before,
" hunting for Fort Miller. It must have been in July,
" 1858, I think. That was after the summer freshet had
" gone down.
" Q—Did you at that time cross the slough to and
" fro?
" A—Yes, sir.
" Q—How many times, do you suppose?
" A—Sometimes daily, almost, at different points, all
" along the length of it.
325 " Q—What did you find the condition of it about that
" time?
" A—About the same as before.
" Q—How did you make your crossings?
" A—We made them on tule rafts.

" Q—You found water flowing at that time from one
" lake to the other; Buena Vista Lake and Tulare Lake?
" A—Yes, sir.
" Q—Was that channel the same as you found it the
" years before?
" A—I could not see any difference in it. We contin-
" ued no further around on that trip. I think I was there
326 " again in 1859, and again hunting. I could not tell the
" time. It was somewhere along the summer season. It
" was after the summer freshets were passed.
" Q—Did you find the same condition of things?
" A—As near as I can remember. I don't remember
" any particular change about it.
" Q—Was there any change in the condition of affairs
" from the time you were there on other trips than when
" you were there in 1859?
" A—None that I can see. We crossed the channel at
" that time to and fro. We crossed as I have described
327 " before, on tule boats. We did not attempt to ford it.
" At that time I went on the connecting channel between
" Kern and Buena Vista Lakes.
" Q—What was the condition of that channel?
" A—Well, it was just the same as I had seen it pre-
" vious visits. On that trip we went no further than the
" head of Kern Lake. At that time I only went to the
" foot of Kern Lake. I did not go to the head of it."

T., II, fol. 324–7.

Of all these trips he testifies:

329 " By Mr. Houghton. Q—Then I would ask you this:
" Every time that you made a trip on Buena Vista Slough,
" did you go the whole length of the slough from Tulare
" Lake to Buena Vista Lake?
" A—Every time.
" Q—Yes?
" A—Yes, I think so.
" Q—And also on the connecting slough between
" Buena Vista and Kern Lakes?
" A—Yes, sir.
" Q—And I understand you to say, you found no per-
" ceptible change in any of those trips?
" A—I didn't notice any."

T., II, fol. 329.

And on cross-examination he testified:

" Mr. Flournoy. Q—*I understand that you are familiar with Buena Vista Slough continuously from* 1854 *up to and including* '59?

" A—*Yes, sir; I saw it all of those years.*

" Q—*Were you there through the freshets or overthrows? I understand you to say that you were there after the freshets passed away?*

" A—*Well sir, during those years there were no great freshets. I was there during those years, after the spring rises.*

" Q—*I understand you to say that you found water*
335 " *very plentiful all along, flowing, or a current, all along down Buena Vista Slough to Tulare Lake.*

" A—*Yes, sir; I should think it was a one or two-knot current in places where I struck it; one or two miles an hour, I mean.*

" Q—*A broad current?*

" A—*It was usually about the width—as far as the width of the slough was—it as was broad as the slough was, or the open water. What I would call the slough would be where I found the open water. What I call the channel of the slough is where we get into open water.*

" Q—*Well, then, where you get into open water, how*
336 " *wide was the channel?*

" A—*I should think* 30 *or* 40 *yards.*

" Q—That was continuous all through from Buena Vista to Tulare Lake?

" A—I could not tell that. I say wherever I got into it and could see it, there was a channel and a current.

" Q—Do you know, then, Mr. Barker, that there was a continuous running stream during the time you were there, from Buena Vista to Tulare Lake?

" A—I know there was one wherever I got into it, that is all.

" Q—Well, do you know there was one from Buena
337 " Vista to Tulare Lake?

" A—No, sir; not to be able to say that I have been the length of it. I have seen the length. It was impossible for any man to see the whole length of it at that time.

" Q—At how many points did you visit the stream itself?

" A—Well, I could not tell you. The was was, we were hunting along there, and used to go to the places where it was easy of access, and camp there, and then go out and hunt. When we wanted to get across the

338 " slough, we would go to work and get across. We
" were not hunting water or a slough. We were hunting
" elk. When we went to the slough we would go for the
" purpose of getting water.
" Q—That is what I understand. You never under-
" took to see whether there was any other crossing of
" the slough?
" A—We never found any.
" Q—Did you hunt for any?
" A—Yes, sir; we would naturally have availed our-
" selves of them, if we could have found them.
" Q—You did not hunt for any particular places?
339 " A—I cannot say that we hunted for them; but we
" never found them; we did not care much about them.
" Q—How deep was this channel?
" A—*Well, in some places we had a long pole, per-*
" *haps* 12 *or* 15 *feet long, and in some places we could*
" *not touch bottom with it.*
" Q—What is the current—between the slough, I un-
" derstand you are speaking of?
" A—*In the slough, between the lakes.*
" Q—*It was a general and continuous channel?*
" A—*Yes, sir.*
340 " Q—*From* 12 *to* 15 *feet deep?*
" A—*In some places where we could not touch bottom*
" *with a pole of that length.*
" Q—*How shallow would it get?*
" A—*From that down to nothing on the shores.*
" Q *What I mean is, did you find any place where it*
" *was much shallower than that?*
" A—*Yes, sir; I found places where it was more than*
" *four or five or six feet, perhaps. I could not tell how*
" *many places I found under four feet. I don't think*
" *there were many places under four feet.*
" Q—*Then your opinion is that the water was running*
" *at any place you found it, at least four feet deep, and*
341 " *it was forty yards wide?*
" A—*Well, yes, I expect so, at any place where I*
" *found; it about that rate.* Of course I was not looking
" at it with an idea of informing myself correctly about
" this; and I cannot speak positively about it. If I had
" been looking for this with an idea that I should have
" to speak about it again, I should have tried to remem-
" ber it.
" Q—I am trying to get at the best of your recollection
" about it. I understood your memory to be very clear
342 " on your examination about it. But I want to get at
" the facts as they were.

" A—*One thing that makes my memory very clear is*
" *that my experience cost me there about* $5000; *and I*
" *remember that part of it extremely well.*
" Q—That particular fact, however, is not material, I
" believe, in this case.
" A—No; but I wanted to give you the reason for my
" memory being so clear. I probably do not remember
" the other facts as well as I do that part of the business.
" Q—That was the condition, as I understand you, all
343 " along from 1854 to 1859 inclusive?
" A Yes, sir; it approximated that, I think, so far as
" my observation would go.
" Q—*You had to ferry across or boat across on rafts*
" *every time you crossed it?*
" A—*Yes, sir; we had to ferry across or cross on rafts*
" *every time we crossed it.*"

T., II, fol. 334–343.

Here we have the testimony of no less than eighteen witnesses, all called by plaintiffs, nearly all of whom have spent the best years of their lives on and along Buena Vista Slough, either attending to cattle and hogs owned by them, or in the employment of those who had stock on the swamp land through which Buena Vista Slough runs. They all testify fully as to the channel of Buena Vista Slough from Buena Vista Lake to Section 24, T. 29, S. R. 23, E.

Their testimony is clear, uniform and conclusive to the point, that there is a continuous and well-defined channel down to said Section 24.

But we are not in this case required to confine ourselves to or rely upon the maps put in evidence, and the testimony of our own witnesses to establish such fact, we have the testimony of no less than three surveyors, Macmurdo, James and Fillebrown, and of Cruso, all witnesses and employees of defendant, to the same effect. Upon their testimony alone we can, with confidence, ask that this Court reverse the judgment of the lower Court, on the ground that the 3d, 18th, 46th, 71st and 72d findings are contrary to the evidence.

Mr. Macmurdo not only made a meander survey of this Slough or channel to Section 24, T. 29, S. R. 23, E., but he plats such channel on a map that defendants put in evidence. He also trails this slough or channel from Wible's Headquarters to Section 24, or Bonestell's, during the trial of this case, and testified that he finds a well-defined slough at the very point which the Court finds the break to exist on Section 15, T. 30, S. R. 24, E.

After defendants have put in evidence maps "H" and "I," "H" showing a continuous water course to the south line of plaintiffs' land, and "I" showing a continuous channel to Section 24. T. 29 S., R 23 E., or to the Bonestell House, Macmurdo, who made the survey and notes from which the maps were made, is called as a witness by defendant, and he testifies:

1061 " I reside in Kern County; have resided there for 6
" years; reside in the vicinity of Bakersfield; about 7
" miles southwest of Bakersfield. I am a surveyor. I
" am County Surveyor at this time of this county; have
" been for 4 years last past. I have made some surveys
" through this portion of the county represented upon
" this Map I. I have been over the most of that country.
" I am familiar with that portion of the county. I made
" *the most of Map I. I know it is correct, or substan-*
" *tially so. It is as correct as a map can be made on*
" *that scale.*
" Q—*Do you know anything about Buena Vista*
1062 " *Slough?*
" A—*Yes sir. I am familiar with Buena Vista*
" *Slough from the lake down as far as it goes; as far as*
" *there is any slough.*
" Q—*Have you made any survey of that slough?*
" A—*Yes, sir; I have meandered that slough as far as*
" *there is any slough to be found; as far as the end.*
" Q—*Whereabouts does it end?*
" A—*It ends on Sec.* 24, *T.* 29, *R.* 23.
" Q—When did you meander that slough?
" Q—I meandered a part of it in May, 1879, and a
" part of it, I think, was in 1880.

1063 " Q—*Have you examined that slough from Buena*
" *Vista Lake to that point you speak of where it ends?*
" A—*Yes, sir.*
" Q—*You say that it ends on Sec.* 24, *T.* 29; *R.* 23?
" A—*Yes, sir.* I know where Wible's Headquarter
" are. They are on Section 15; I think it is on 15, or near
" the line of 14 and 15, T. 30, R. 24. It is on the east
" half of the east half of Sec. 15. I think it is about a
" quarter of a mile from the south line of Sec. 15. It is
" on the S. E. quarter of the S. E. quarter of Sec. 15."

T., IV, fol. 1061–3.

Mr. Macmurdo is requested to describe this slough from a point south of Wible's Headquarters to the point where his meander survey terminated.

After describing the levee across Buena Vista Slough, near Wible's Haedquarters, the witness continues:

" Q—After crossing the levee and going northward,
" will you describe this slough?
" A—*This slough continues on pretty much the same*
" *character of slough. It is very crooked; gouged out in*
" *deep holes on the bottom: has perpendicular banks in*
" *places; continues on in that way probably a mile to*
" *the northwest; it continues that way to Section* 15, *un-*
" *til it reaches the north line of Section* 15.
" Q—Continues how?
1068 " A—*Continues to run very crooked, and it has very*
" *deep holes along there, and it has well-defined banks*
" *until it reaches very nearly the north line of Section*
" 15, *T.* 30, *R* 24. There are ponds on the outside of
" the channel, and the water of the slough goes up in
" this pond there and into Section 15, between the chan-
" nel and the bank of the canal.
" Q—*You say that it has defined banks. How are the*
" *banks as to height above the bed of the slough?*
" A—*It is hard to tell where the bed of the slough is*
" *there. There are deep holes in it. In some places*
" *they are* 10 *feet, I suppose, above the bottom of the*
1069 " *slough.*
" Q—*These deep holes?*
" A—That is the deep holes. The water;—*take an*
" *ordinary small head of water, and run it through there*

" *and it will be probably* 4 *feet above the surface of the*
" *water.*
" Q—*That is, the lowest bank in there would hold* 4
" *feet of water in Section* 15.
" A—*I don't know. There are probably lower places*
" *than that.*
" Q—*There are places where* 4 *feet of water would not*
" *be contained in the banks?*
1070 " A—*I think so.*
" Q—*From the north line of Section* 15, *describe the*
" *slough through the next section, that is, Section* 10, *T.*
" 30, *R.* 24.
" A—*The slough, a part of the way, has good banks in*
" *there, and it is very crooked, and the current is very*
" *sluggish, very slow.* It has very little fall, and it has
" very low ground on both sides. There are places where
" the bank is very low, almost as low as the bed of the
" stream in places On the east side of the slough the
" bank, as a general thing, is higher than on the west
" side.
1071 " Q—The bank is as low as the bed of the slough
" itself?
" A—Yes, sir.
" Q—*What depth of water will that portion of the*
" *slough carry without getting out of the banks through*
" *Section* 10?
" A—*I hardly know how much it would carry; in some*
" *places it has deep holes in there. Through the greater*
" *part of* 10 *it would carry, probably as much water as*
" *in* 15, *until it got pretty well up into Section* 10. *Then*
" *the banks are lower, and it would carry very little*
1072 " *water;* 2 *or* 3 *feet of water above the general bottom of*
" *the slough.*
" Q—*You think it would carry* 2 *or* 3 *feet at every*
" *point through without overflowing the banks at all*
" *through* 10?
" A—*No, sir; up to a good wag in* 10. *I say I don't*
" *know how far exactly: pretty well up into* 10. The bank
" on the east side is a good bank. On the west side it is
" low. and it has a levee along that bank to keep the
" water from flowing out.
" Q—*Then, in your description of the amount of water,*
" *have you taken into account the levee that is used?*
" A—*No, sir*; through the balance of Section 10 the
1073 " banks get lower, and continue to get lower until it gets
" up into Section 3.
" Q—How is it in Section 3?

" A—The banks there are lower, and there are hardly
" any banks to it at all. It would carry probably one
" foot of water along there without overflowing?
" Q—How is the general course of the slough through
" Section 3?
" A—It is not so crooked as through Section 10. It
" runs through a small portion of Section 3, only.
" Q—*And then from the north line of Section* 10, *what*
1074 " *is the course of the slough for the next mile or two; is*
" *it correctly laid down here on Map I?* A. Yes Sir
" Q—*It runs through a little portion of Sections* 3 *and*
" 4, *and seme of Section* 5, *and to the north township*
" *line of Section* 30?
" A—*Yes, sir.*
" Q—From the north line of Section 10, to where it
" reaches the township line, please describe the slough.
" ~~A—*Yes, sir.*~~
" A—The slough there is very shallow and undefined.
" It has banks in some places, and they are very low,
1075 " and in other places it has no perceptible banks, and
" is very undefined. The general course of the slough
" is northwest. It is pretty crooked, and has a great
" many bends.
" Q—*After leaving Section* 10; *as laid down on this map*
" *I, and going through Section* 32, *and a portion of Sec-*
" *tion* 31, *to the north line of* 31, *T.* 29, *R.* 24, *how was*
" *that portion of the slough?*
" *A—That portion was a well defined slough, having*
" *banks probably two or three feet high.*
" Q—*Will you look at the map and describe the re-*
" *maining portion of the slough from the north line of*
" *Section* 31, *T.* 29 *R.* 24?
1076 " A—*The slough there has banks; but the banks from*
" *there begin to get lower, and the slough begins to get*
" *narrower and smaller, and shows signs of decreasing in*
" *every way in its capacity.* The tules are growing in it
" in places, but not entirely across. *Then coming down*
" *feom the north line of* 31, *same township and range, the*
" *slough has a defined channel, from there through Sec-*
" *tion* 25, *T.* 29, *R.* 23. *The channel is still very crooked,*
" and is getting smaller all of the time to the north line of
" Section 25, and the balance of the slough through
" Section 24, for about half a mile, has very low banks.
" The banks get lower as you go north, until finally it
1077 " runs out in the tules; and there is no appearance of a
" channel. The water spreads out all over the tules
" there—the swamp. There is no appearance of a chan-

" nel any further. We were unable to trace it any fur-
" ther, any defined channel.
" Q—*Your object in making that meander was, what?*
" A—*To find and to lay down correctly on the map*
" *any channel that there might be through that body of*
" *swamp land.*
" Q—In going from Wible's Camp north, did you find
" any branches or other channels running out of that
" channel?
1078 " A—I found no branches at the time I was meander-
" ing it, found no branches at all. At other times I have
" seen the water flowing out all over the banks; I did
" not call them branches.
" Q—When you meandered through there was there
" any water in the channel?
" A—The first time I meandered from the Headquar-
" ters camp down towards Section 3, there was water
" standing right in the tules; there was no water run-
" ning in there at the time. I crossed it at Section 4,
" I think it was T. 30, R. 24; I crossed it at that time,
" and there was no water holes or water at all at that
1079 " time.
" Q—When did you meander the balance of the
" channel?
" A—The balance of the channel southward from there
" towards the Headquarters camp, and there was water
" standing in deep holes in it.
" Q—From Section 4, northward, when did you finish
" meandering?
" A—In 1880, I think, about May—April or May, I
" think it was—I saw no branches.
" Q—When you reached the end of the slough in Sec-
1080 " tion 24, did you go any further north at that time?
" A—Yes, sir; I went northwest and northeast; but
" the water was flowing out all over the country so that I
" could survey no further. I went as far as I could trace
" out the channel—that is, as far as I could perceive any
" channel at all.
" Q—When were you down on the slough again from
" Wible's Headquarters northward?
" A—I think I was there again in September or Octo-
" ber, 1880. The slough at that time was dry. I went
" along it again, a portion of it, between the south line
" of Section 32, T. 29, and along the banks of it up to
1081 " Bonestell's house. I went up to the east bank of it,
" and crossed over before we got to Bonestell's.
" Q—*How wide is that slough at the various points*
" *and parts?*

" A—*It is of different widths; it has different widths*
" *at different points. It would average* 50 *or* 60 *feet*
" *wide from the line through the south line of Section*
" 32. *From there northwesterly it would average from*
" 50 *to* 60 *feet, and right near the end of it, where the*
" *channel ceases,* just before you get to the end of it, it
" is just about 20 feet; gets smaller for about one mile
" before you get to the end of it, and begins to grow
" smaller. *Where the channel ceases, where I stopped*
" *my survey of it,* it had just spread out into the tules.
1082 " After October, 1880, I don't think I was there again
" until April, 1881, about the first of the month. I then
" found there was a small head of water running down
" the Buena Vista Slough. It was running from—I
" don't know where it was running from. I crossed it
" down below Headquarters camp. It was running
" down there. It was coming down from the waste gate,
" I suppose. There was no other place for it to come
" from. The waste gate of the Kern Valley Water Com-
" pany's Canal. I suppose it was coming from there.
1083 " I didn't go up to see. I know of no other place where
" it could come from.
" Q—*How was the water in that slough?*
" A—*Where I crossed the slough, or touched it, the*
" *water was all in the slough.*
" Q—*Whereabouts was that?*
" A—*That was in Section* 32, *T.* 2, *R.* 24."

* * * * *

T., IV, fol. 1067--83.

The witness then testified that the Bonestell House is on the S. W.¼ of Section 24, T. 29 S., R. 23 E. (Fol. 1087.)

The witness is then questioned as to a trip he made to Buena Vista Slough on April 17 and 18, 1881. He says:

" From Section 20, I
" went west through the swamp land to the Bonestell
" House. I did not go to his house, but I went across
" Weed Island, south of Bonestell's house, a part of the
" way on the road.
" Q—Was there any channel there that you saw?
" A—Yes, sir.
" Q—Whereabouts?
" A—I crossed the channel through Weed Island.

1096 " Q—Whereabouts?
" A—I did not locate it exactly where I crossed it. It
" was probably on Section 30, or Section 25, T. 29, R.
" 23. It was only a short distance south of Bonestell's
" house, probably half a mile.
" Q—*Was that the channel you had meandered be-*
" *fore?*
" A—*Yes, sir. The same channel. That was the*
" *only one I saw.* From there I continued in a westerly
" direction through the swamp land to the levee on the
" west margin of the swamp."

T., IV, fol. 1095–6.

* * * * *

The witness is then examined as to a cross-section run across the body of swamp land on the 28th of April, 1881, commencing at the S. E. corner of Sec. 28, T. 29 S, R. 24 E., on a line S. 16° W. (fol. 1115).

Witness says:

" On the line from the southeast corner of Section
" 28, we ran through Section 33 into some portion of
" Section 4, T. 30, R. 24. We found water spread out
" over the ground, so that the animals could not go any
1116 " further; they bogged down. We sent the wagon back,
" and Mr. Fillebrown and myself continued on through
" the swamp with those levels."

Fol. 1115 and 1116.

" We were going through this water
" knee-deep until we came to where the water was run-
" ning. We took the surface of the water there, of the
" depth of it, which was the deepest water we found in
" the swamp in crossing. I don't remember the exact
" depth. I think it was nearly waist-deep. It was 2
" feet .7, I think. That was the deepest water we found.
" We had gone through the water, I should judge, about
" half a mile. We took the level of the water there, and
1119 " then went through and took as nearly the same course
" as we could to the west margin of the swamp; and
" when we got near to the west margin of the swamp, we
" found the edge of the water, and then we continued on
" in the same way, the same course, sounding the depth
" as we went along. Its greatest depth was 1.4. *Where*
" *we struck it, it was* 2.7, *I think, about waist-deep.*
" Q—*Do you know where that was you struck that?*

" A—*It was on Sec.* 4, *at some point. I can point it*
" *out on Map* I. [*Witness does so.*]

T., IV., fol. 1118–19.

* * * * * *

1129 " By Mr. Haggin. Q—*Do you know whether that por-*
" *tion that was depicted on here is the channel you have*
" *described as the slough from Wible's Camp to Bones-*
" *tells, on Map "I," whether that is shown on that sec-*
" *ond profile?*
" A—*Yes, sir; it is shown at this point here.*
" Q—*That is on the eleventh thousandth feet?*
" A—*Yes, sir; from the southeast corner of Sec.* 28,
" *and then it leaves the slough,* and at the seventh is the
" pond. This second profile is correct from my survey
" and notes; as near correct as can possibly be.

T., IV, fol. 1129.

The witness then is questioned as to a trip to Buena Vista Slough, made May 15, 1881, (while the trial of this case was going on and thirty days after the trial commenced).

" Q—Have you been down on that portion of this body
" of swamp land north of Wible's Camp at any time since
" this that you last mentioned—this last cross-section?
" A—Yes, sir; I was down there about a week ago; I
1144 " think it was on the 15th of May; I went down to De
" Weber's, and went across the swamp land at right angles
" to the general direction of the swamp, following the
" old road from De Webber's on Section 20.
" Q—Is the De Webber place marked on the map Ex-
" hibit D?
" A—Yes, sir; it is on Section 20, T. 29, R. 24; from
" De Webber's we followed along the old road that used
" to go through the swamp there; *followed it around until*
" *we struck the slough there; then we went up to Bon-*
" *nestell's house and got across; I think the road dotted*
" *on Map D is the way the road runs, but I don't know it;*
" *we followed that until we struck the slough;* then we
1145 " went to Bonestell's house, and crossed near Bones-
" tell's house."

T., IV., fol. 1143–5.

The next day the witness again goes to Buena Vista Slough, but first comes to it at or near Wible's Camp. Of this trip he says:

" *The next morning, I think it was May 15th, we*
" *went down to the point where the levee of the Kern*
" *Valley Water Co. crossed the slough; and from there*
" *we followed up the bank of the slough, the right bank,*
" *the east side of the slough; we went up to Crocker's*
" *place.*
" Q—*Whereabouts is that?*
" A—*It is on Section* 10—*I believe it is on* 10; *or a*
" *part on Sec.* 15 *and a part on Sec.* 10.
1154 " Q—*The east bank of the slough near Crocker's house;*
" *how did you find the slough? What did you see?*
" A—*We found a slough there; a pretty good slough*
" *from the levee up to Crocker's place.*
" Q—Did rou see any water there?
" A—Yes, sir; there were some ponds out there on the
" west side, between the slough and the bank, and then
" just before we reached Crocker's place on the east side
" of the slough, there was some water running out of the
" slough into the pond on the east side of the slough.
" *That was where Mr. Norton is living now. The Crocker*
1155 " *place and the Norton place are the same.*
" Q—Then, going along the east bank of the slough as
" far as the Crocker place or the Norton place, what did
" you do?
" A—I crossed over to the west side and followed the
" west side of the slough, then up to the south end of
" Weed Island.
" Q—You crossed over to the west side; in follow-
" ing along the west side of the slough from Crocker's
" place did you go along the levee that you mentioned
" before?
1156 " A—No, sir; the levee that I spoke of before was a
" levee running across the swamp.
" Q—You described a levee somewhere along in there
" on the west bank of the slough?
" A—*Yes, sir; it commences near Crocker's barn and*
" *follows along the west bank of the slough, and follows*
" *the direction of that slough, which comes down right*
" *in here on Section* 10, *the south line of Section* 10, *runs*
" *along through Section* 10 and out through the north
" end, probably a short distance north of the north line
" of Section 10; *it follows the general direction of the*
" *slough.*

1157 " Q—What purpose was that levee answering there?
" A—It seems to keep the water off from Crocker's
" place. The ground is low to the west of that levee.
" There was cultivation to the west of it. Mr. Crocker
" had a field under cultivation there, and I think the
" levee protected that field. In going from Crocker's
" place we went along that levee; it is higher in some
" places than in others; where it crosses the low ground
" it is higher than it is where the slough has a good
" bank.
" Q—Is there any water in that slough?
" A—Yes, sir; the water was in the slough at that time.
1158 " Q—Was there water in there against the levee?
" A—Yes, sir; there was water in there against the
" levee in a good many places.
" Q—Could you see what the effect would have been
" had there been no levee there?
" A—A good deal of the water in the slough would
" have gone out over the west bank of the slough if
" the levee had not been there; I don't know whether
" it would have gone to where it is cultivated now;
" I think some of it would have gone to the cultivated
" land. *I followed that along for a mile; I think it*
" *went through the north line of Section* 10*; I went to*
" *the northern end of it.* The northern end of it was all
1159 " low, and it was overflowed at that time; the water was
" on the west side of the levee, in the slough, before we
" reached the end of it. There were some ponds soon
" after I passed Crocker's fence; soon after I left the
" barn, probably a quarter of a mile from his barn, there
" was some ponds there. And then, after going down a
" short distance further, the water was all over that
" country.
" Q—*How far was that channel overflowed before you*
" *reached the end of the levee?*
" A—*I think it was probably a quarter of a mile; a*
" *quarter of a mile south from the northern end of the*
1160 " *levee, I think.*
" Q—In going along that levee did you see any water
" at all to the eastward of the slough?
" A—After crossing the slough?
" Q—Yes, sir. After you crossed the slough and got
" on to the levee, could you see across the slough to the
" eastward?
" A—Yes, sir; I could see across the slough to the
" eastward in places. I could not see very far for the
" tules, but the banks were low in places and we could

1161 " see that the water was right up against the tules; we
" could not tell what kind of a current it had, or whether
" much water was running in it or not. It was all in the
" tules.
" Q—That was to the eastward of the slough itself, was
" it?
" A—Yes, sir.
" Q—Then you could see that the water was both west-
" ward and eastward of the slough?
" A—Yes, sir; from the lower end of the levee; *after*
" *reaching the northern end of the levee, we continued*
" *up as near the bank of the slough as we could get to it;*
1162 " *the water was deep, probably waist-deep off from the*
" *bank,* and the overflow running through the tule from
" knee-deep to waist-deep; and we followed around and
" went into the channel at several places, right through at
" the end of the levee. There was water running around
" the end of the levee, and outside the channel of the
" slough the water was going in almost every direction;
" the most of it was going westerly, running out towards
" the tules, and into the tules on the west side of the
" levee. We went out into the water where it was run-
" ning [showing on Map D]. We went from the end of
" the levee up to this point of the slough here on Section
1163 " 3, between Sections 3 and 4; we went almost immedi-
" ately northward; I don't know whether that line of the
" levee runs along where the words, "located from actual
" survey," are or not; it was about that way; *followed*
" *around the general direction of the slough pretty much*
" *as those words run;* we went from the north end of the
" levee into the deepest water we could find; it was waist-
" deep, nearly up to our shoulders; we were in the water
" from the time we left the end of the levee until we got
" to Weed Island.
1164 " Q—How far up is Weed Island?
" A—Weed Island extends down to Section 32; a little
" beyond Section 32; *after reaching the point which is*
" *marked "Central Cut" on the Map "D," we came down*
" *along the banks of the slough,* in the water all the time;
" the surrounding country was all grown up with tules,
" and the water was all spread out all over the tules.
" Q—*Did you go into the channel of this slough—into*
" *the middle of it?*
" A—*Yes, sir; the water was waist-deep, and from our*
" *waist up under our arms; the banks, most of them,*
" *were under water; some of them six inches high above the*
" *water.*

1165 " Q—*Could yon trace the banks easily?*
" A—*No, sir; not at all.*
" Q—*How did you know where the banks were, then?*
" A—*The water was shallower; if you went to either*
" *side you would find the water shallower than in the*
" *channel; that is the only way we could trace it, and by*
" *the tules;* we branched out from the slough around into
" the tules, probably half a mile, the water was spread
" out all through there, and tules grown up and dense;
" we found no channel through there.
" A—*Then you followed the slough you have described*
" *up to Weed Island?*
1166 " A—*Yes, sir;* I don't remember how many times we
" branched out; we were prospecting around in there all
" over that place; *sometimes we would get into the chan-*
" *nel, and then strike out again, and strike the channel*
" *somewhere else further down*; and then we would go
" back, and follow around, back and forth, through for
" half a day.
" Q—*Then when you got to Weed Island, whereabouts*
" *did you go to on Weed Island?*
" A—*We crossed the slough,* then, back to the east
" side, and from that point we went east; on Weed Island
1167 " we came to ground that was above the water; high
" ground and dry. *Then we crossed the slough to the*
" *east and went on the east side of the slough back to*
" the east side of the swamp, and to the end of the east
" side canal, following the line of the ditch through
" there.
" Q—Will you point out on Map "D" about where
" you went?
" A—We came on the west side of the slough until we
" reached this point here on Section 31; on the southeast
" quarter of Section 32. We went from there down to
" the corner of Sections 32 and 33; that would be the
1168 " southeast corner of section 32. From there we went
" west along the north line of Section 4.
" Q—Where did you find the canal that you speak of?
" A—That was along on the north line of that Section 4,
" until it got pretty nearly to the corner of Section 4;
" then it bore off to the south and ran through Section
" 3. It is a ditch part of the way and a levee part of the
" way."
"
" T., IV, fol. 1153-68.
"

* * * * *

" [The witness' attention is called to map "H."]
" Q—*Do you know anything about that map "H"?*
1184 " A—*Yes, sir; I know that is a map of the end of*
" *Kern River and a part of Buena Vista Slough.*
" Q—*Is that map correct?*
" A—*Yes, sir; it is substantially correct.*
T., IV, fol. 1183–4.'

On cross-examination the witness says:

I have examined that
" *part after it was on the map and find it to be correct.*
" *Kern River is correct as laid down on that map.* The
" lakes there I did not make.
" Q—Do you know anything about the lakes being
" correctly delineated upon that map?
" A—No, I do not. I don't think they are. I don't
" know whether they are or not. I know part of the
" map is correct. I know the northwesterly extremity
1232 " of Buena Vista Lake is correct. I think the lakes are
" correctly delineated on that map.
" Q—*What other work is there on that map that you*
" *didn't do?*
" A—*The slough along there, marked "Buena Vista*
" *Slough," I didn't do that.*
" Q—*Do you know whether that is correct or not?*
" A—*Yes, sir. That is correct. I have examined it.*
" Q—*I understand you meandered that slough?*
" A—*Yes; sir.*
" Q—When did you do that?
" A—*I did a part of it in* 1879, *and a part in* 1880.
" The part I did in 1879, was in May, and a part in July.
1233 " In May, I did that part lying between that northwest
" corner of Section 24, T. 30, R. 24. [Pointing it out
" on the map I.]
" Q—And what other point?
" A—To the west line of Section 3, in the same town-
" ship and range. I don't know whether I have the
" notes of that meander or survey, or not. I last saw
" them at the Bellevue Ranch, probably a month ago;
" but I have not seen them for several weeks; probably
" last about a month ago. The water was standing in
" holes when I ran that meander line; no water running
" there. I did not run levels at the same time. *In*
1234 " *July,* 1879, *I ran the line from Buena Vista Lake to*
" *that point where I started before.* At that time there
" was not a great deal of water in the slough; it was not
" running; I think not; I don't remember; I have not

" the notes of that survey; it is some time since I saw
" them; I last saw them at Bellevue Ranch; the draughts-
" man had them there.
" Q—*When did you meander the balance of that*
" *slough from Section 3 north?*
" A—*In* 1880; *I don't remember whether it was in*
" *April or May; May, I think.*
1235 " Q—*What was the condition of the water of the*
" *slough at that time?*
" A—*There was water running through the slough;*
" *there was not a great deal; a pretty good head of wa-*
" *ter going through. I could not just estimate it, be-*
" *cause the current is very slow; a very sluggish stream.*
" *I crossed it from time to time in* 1880. *The water was*
" *about* 2 *feet or* $2\frac{1}{2}$ *feet deep; deeper in some places*
" *than in others. There were some places in holes it was*
" *pretty deep.*
" Q—*How far did you follow that meandering at that*
" *time?*
" A—*To Section* 24; *probably the north half of the Sec-*
" *tion* 24, *T.* 29, *R.* 23.

T., IV, fol. 1231–5.

* * * * *

1238 " Q—*Did you say whether you put that meander line*
" *on there, or not, of that slough?*
" [*Referring to Map I.*]
" A—*The meander line of the slough?*
" Q—*Yes, sir.*
" A—*I don't see any meander of the slough there.*
" Q—*The line of Buena Vista Slough?*
" A—*I didn't put that on there. I examined that, and*
" *found that to be correct; substantially correct.* That
" map is made upon a scale of $\frac{3}{4}$ of an inch, equal to
" 80 chains.
" Q—*What lines are laid down upon that map by*
1239 " *actual survey?*
" A—*Well, nearly all of these are laid down by actual*
" *survey. That is, the slough there, the river, and those*
" *canals.*
" Q—*What slough do you mean?*
" A—*Buena Vista Slough.*

T., IV, fol. 1238–9.

* * * * * *

" The South Fork is cor-
" rectly laid down on that map, and Old River. The

" branches of New River are laid down on that map from
" actual survey. I made some of them. I ran the
" meander lines down there in 1879, I think it was.
" Q—Did you run a meander line on the north, south
" and middle branches that are represented there?
" A—Yes, sir; all of them; and they are platted from
1241 " my meanderings and survey.

T., IV, fol. 1240–1.

Referring to Map "H," he says:

" *I made Map H. That was in April.* I did not make
" that from notes, but copied it from another map, which
" was a map just like this. I did not make that other
" map. I don't know who did.
" Q—*Do you know anything about the corrections of*
" *that other map?*
" A—*Yes, sir.*
1248 " Q—*How do you know that?*
" A—*Because I compared it with the other map.*
" Q—*How do you know about the correctness of the*
" *other map, if you didn't make it?*
" A—*Because I surveyed all that country and I*
" *know it.*
" Q—*Have you compared that Map "H" with your*
" *notes, checked it off?*
" A—*No, sir; I have not.*
" Q—*Then you simply know it is correct by looking*
" *at it?*
" A—*No, sir. I know it is correct by a copy of my*
1249 " *notes.*
" Q—*Have you checked that off by your notes?*
" A—*A portion of it I have checked off.*
" Q—*What portion?*
" A—*Buena Vista Slough there,* and the balance I
" have not checked off. *I know it to be correct from*
" *my knowledge of the country.*

T., IV, fol. 1247–9.

* * * * * *

" Q—*There appears to be in Buena Vista Slough*
" *certain breaks; what is the meaning of that on Map H,*
" *Section* 32?
" A—*It means where the channel is hard to determine,*
" *where the channel is. There are ponds all out there.*
" *Those ponds are represented on this map as well as*
" *they can be.*

" Q—*Is there any connection between those ponds*
" *at all?*
1252 " A—*None that I know of, but the water; they are*
" *connected by the water when the water is there, but it*
" *is spread out, and the banks are hard to determine.*
" *I don't mean to say they are not connected at all, by*
" *simply leaving these breaks in there.*
" Q—*Then that map is incorrect, as far as that water*
" *course is concerned?*
" A—*So far as that part of it is concerned, that map*
" *is correct.*
" Q—*There is no connection between those ponds?*
" A—*This shows the connection.*
" Q—*If it don't appear there, how is the map correct?*
1253 " A—*The map is correct, because the water is shal-*
" *lower between those places than it is there* [pointing].
" Q—***Then, in running a slough or watercourse, do***
" ***you make a break in it when you come to shallow***
" ***water?***
" A—***When the bank is not defined?***
" Q—*Although the stream continnes a few yards*
" *beyond?*
" A—*Yes, sir.*
" Q—*If it ran over a piece of flat land for ten yards,*
" *you would make a break in it?*
" A—*If it ran over a piece of flat land and has no*
1254 " *banks, I don't make any banks there. I would not*
" *mark a water course where there is no bank and the*
" *water is spread out.*
" Q—Was there any water running there at the time
" you made that?
" A—The water was standing there; I don't remember
" that there was running water there at that time.
" Q—Will you describe the condition of that slough,
" or whatever you have a mind to call it, at that point,
" and between those places on Section 32, on Map H?
" A—The slough at that point is right at the base of
" the hills that came in from the Coast Range on the
1255 " west of that country, and the water comes down there
" and stands in ponds all through that country; and at
" that time it was all grown up with tules, and there
" were deep holes in it in places. Some of these holes
" were only a few yards and some were a hundred yerds
" apart. I don't know how many; they are not all
" marked. There are several ponds there that are not
" put down on that map.
" Q—What was there between those holes?

" A—There were tule roots and one thing and another;
" the country was all grown up with tules.
" Q—Was there any place where, when the holes were
1256 " filled, the water would run from one to another?
" A—Yes, sir.
" Q—What was the condition of the bank of that slough
" along by those hills that you speak of?
" A—The bank was about 150 feet high, I should think,
" on the west side; on the east side it was, as I have marked
" it on the map, hard to find any bank at all. I should
" say it was a quarter of a mile before I would find any-
" thing to prevent the water from going towards the east.
" The water would spread over the country for a quarter
" or half a mile, and then if there was enough water that
1257 " way in the slough it would run, if left to itself, the most
" of it down Buena Vista Slough.
" Q—Do you mean to say that if you should turn water
" into that slough from Buena Vista Lake that before it
" would pass on from one lake to another, that it would
" spread all over the country half a mile wide?
" A—Well, some water would run through before it
" spread that much. But if you turned enough in to
" fill the slough, it would spread that much; that is,
" enough to fill the slough up to the bank as it is marked
" on that map; that is, if you should turn water enough
1258 " in to fill up the slough bnak full, at a point south of
" these lakes, it would then spread out half a mile.

T., IV, fol. 1251-8.

Referring to Map "I" again, he says:

" *I have been down on Buena Vista Slough before*
" *the Wible levee was thrown acress at Headquarters*
" *near that point. But I never ran a survoy or meander*
" *along that slough before that. I never made any sur-*
1270 " *veys of it before that; I never surveyed it. I know*
" *that it ran like it is laid down on this map I, because*
" *that is the proper way for it to be there. I mean map*
" *"I." I don't know whether it ran in two branches at*
" *that point or one."*

Tr., IV, fol. 1269-70.

On cross-examination, being questioned as to his trip along Buena Vista Slough, in April and May, 1881, he testifies:

" I was down on Buena Vista Slough
" with Mr. Crusoe near Headquarters, in May of this
" year, on the 14th and 15th, I think it was. We then
" went first to the DeWebber place, and from there to
" Bonestell's. We did not go there direct from one
" point to the other. *We went directly to the slough.*
" and from there to Bonestell's. We reached the slough
1271 " some distance south of Bonestell's; probably a mile.
" We did not cross it where we first reached the slough.
" One reason was that we did not know whether we
" could cross, on account of the bogs there, and another
" was that we wanted to go to the Bonestell House. *We*
" *did not measure the depth of the water at the point*
" *where we first reached the slough. We had measured*
" *it before that, at the same point, in* 1880. *I don't*
" *remember exactly how deep it was then. It was*
" *about one and a half or two feet; the bank at the*
" *point where we reached it was* 3 *or* 4 *feet high, and*
" *there was more water in it than there was in* 1880.
" We turned from there and went to the Bonestell house.
1272 " We followed the road from the De Webber house to
" within 300 or 400 yards of the slough. Could not fol-
" low it any further. At this point I had measured the
" water before on the road. From there we followed
" right on the slough, as near as we could get to it, and
" went around by Bonestell's. Crossed near Bonestell's.
" Drove right through the slough where the horses had
" been crossing. We saw tracks across.
" Q—How deep was the water where you drove across
" there ?
" A—It was 2 feet deep. It came up to the hubs of
1273 " the buggy. As I recollect it, that was all. I don't think
" it came any higher than that. It did not come inside
" of the buggy. Mr. Crusoe was with me in the buggy.

T., IV, fol., 1270–3.

* * * * * *

" *I was down there again with Mr. Crusoe the following*
" *day. We went down where the levee crossed the*
1275 " *slough near the Head-quarters camp.*
" Q—*Did you go down into the line of the slough?*
" A—*Yes, sir; on the east side. We followed along*
" *on the east side until we reached the Head-quarter*
" *place—that is, the Norton place—and we crossed there*
" *and went across on a wire stretched across the slough.*
" Q—*How deep was the water at that point?*
" A—*The water was—I don't remember exactly. They*

" *measured it. I did not measure it myself and don't*
" *remember. It was about five or six feet deep.*
" Q—*How wide was it at that point?*
" A—*I did not measure it; probably* 50 *feet.*
1276 " Q—How wide was that slough where you crossed it
" at Bonestell's?
" A—I cannot say; probably not over 30 or 40 feet;
" may be wider at that point. In that place it is, where
" they had been crossing, and the water had hollowed
" out the banks some little distance. I don't think it
" was over 40 feet. From Norton's we went down the
" field a short distance until we struck the levee—Crock-
" er's field. It was a hay field. It seemed to have been
" cut for hay, alfalfa and grain. The greater part of it
" had been cut. Then we kept north until we struck the
" edge of the slough; probably went half a mile before
1277 " striking the slough. *We then came back along the*
" *slough on the levee;* came up keeping on top of the
" levee to a barn. After reaching a barn we went back
" down the levee again, following the levee about one
" mile or a little more to the end of it. *We then went*
" *north and kept along the bank of the slough until we*
" *got to where the slough made a bend toward the south*
" *again.* When we came to the end of thelevee we found
" a sheet of water spread out through there. The water
" was running some in a southwesterly direction. We
" crossed the water at that point. The first running
1278 " water we crossed was about six feet wide; about be-
" tween five or six feet wide. Then we reached more
" water. It seemed to me about a mile after we crossed
" the running water before we reached high land again.
" Q—After crossing that 6 feet of water, you went
" nearly a mile before reaching high land again?
" A—Yes, sir; I don't think we reached any high land
" until we got to Weed Island. After crossing that 6
" feet of running water, we were going through water the
" most of the time for a mile. We ran through running
" water after crossing this six feet almost the whole dis-
1279 " tance; nearly the whole distance the water was run-
" ning.
" Q—After crossing that six feet of water, did you not
" go immediately upon high land again?
" A—No, sir; we continued right on the water all of
" the time. When I was down there with Mr. Crusoe we
" were on the west side, and crossed to the east; *crossed*
" *it on Sec.* 32, *near the Willows.* The water at that
" point was out around the Willows some distance, shal-

"low water. *It was hard to tell how wide the slough was*
"*at that point where I crossed. The running water in*
"*the slough there was probably* 60 *feet wide; it was*
"*waist deep.*

1280 " Q—Wasn't it more than waist deep?
" A—I don't think it was; it may not have been so
" deep. The mud was in the bottom about 1½ feet deep;
" and that made the water come over my waist; but the
" mud was a foot and a half deep. We waded across,
" and the water came just over our waist. It did not
" come up to our arms; between the waist and arms."

T., IV, fol. 1274—1280.

He is cross-examined as to this cross section he made with Mr. Fillebrown from the SE. ¼ Sec. 28, T. 29 S., R. 23 E., and says:

1316 " The next crossing
" we made, was starting from the southeast corner of
" Section 28, T. 29, R. 23. Going across there we took
" a course south 16 degrees west; fixed it by a compass;
" on the other side we took some points on the moun-
" tains, and we started in the direction of those points; I
" don't remember what distance we kept upon that course
" before we turned off; it was very near the slough,
" though; probably a mile and a half. During that whole
" distance we were going on a line S. 16 degrees W.

T., IV, fol. 1316.

* * * * * *

" Q—*At what station did you reach Buena Vista Slough*
1319 "*—at what number?*
" Mr. Haggin—*He has not said that he reached Buena*
"*Vista Slough.*
" Mr. Houghton—Mr. Fillebrown so testified, and
"here it is: "In Buena Vista Slough, Station 103."
" Q—*Then, how far had you gone before you reached*
"*the slough?*
" A—*We had gone about ten or eleven stations; we*
"*had gone* 103 *stations*—10,300 *feet.*"

T., IV, fol. 1318-19.

* * * * * *

The witness is then asked to draw a line on map "B," showing the course taken in making this cross section from the SE. corner of Sec. 28, T. 29 S., R. 24

E., to reach to 114th station (fol. 1325). He does so. This line appears on Map "B," crossing Buena Vista Slough on Sec. 4, T. 30 S., R. 24 E. Macmurdo had testified that this line crossed Buena Vista Slough on Sec.4, T. 30 S., R. 24 E.

He says:

"Where we struck it, it was 2.7, I think about waist
" deep.
" Q—Do you know where that was you struck that?
" A—It was on Sec. 4, at some point."

T., IV, fol. 1119.

Macmurdo and Fillebrown testified to finding the slough over 100 feet wide on the line they crossed it, and with banks 4 feet high, with 2 9-10 feet of water running in it. (T., IV, fols. 347-8, and fol. 1342.) Still this crossing, it will be seen, was at the point where Macmurdo says the slough was least well-defined, and just at the point where counsel in their diagram, inserted in their brief, make a break in Buena Vista Slough, and claim there was no channel.

Again referring to the character of the slough depicted on Map "I," the witness says:

" Q—*You speak in your cross-examination, or was saying something about the way the water went in the slough that is depicted on this Map "I," north of Bonestell's Headquarters. About what sort of a current would it have?*
" A—*The current was very sluggish and slow. If the current was a swift current through there the slough would not be as tortuous as it is, I think.*
1365 " Q—*From the very formation of the thing it could not have a swift current?*
" A—*No, sir.*

T., IV, fol. 1364-5.

Mr. Crusoe, an employé of Haggin & Carr, is sent to Buena Vista Slough, with Mr. Macmurdo, to examine the slough from Wible's Headquarters to the Bonestell House. He gives the result of that visit made

while this case was on trial. He says: "I am in the employment of Mr. Haggin, and have been since 1877." (T., IV, fol. 239.)

L. Crusoe,

Recalled for defendants.

" Mr. Haggin. Q—Have you been down on that body
" of swamp land that lies north of what is known as
" Wible's Camp?
" A—*Yes, sir; I was down there last Saturday the*
" *14th of this month; I went down to the De Webber*
202 " *house.*
" Q—Will you point it out on the Map D?
" A—Yes, sir, the DeWebber House is on Section 20,
" T. 29, R. 24 (pointing.) From there we followed across
" the swamp in the direction of Bonestell's, along the
" road marked "Wagon road, Bakersfield," about in that
" direction.
" Q—Did you go to that channel there that is marked
" on the map on Section 30, or about there?
" A—*We went in this direction; struck the slough*
" *somewhere in that neighborhood south of Bonestell's;*
" *I suppose it was half a mile or probably three-quarters*
203 " *of a mile south of Bonestell's; we then turned down*
" *the slough near the Bonestell House; we crossed the*
" *slough just south of the Bonestell House, and went*
" *right up to the house and well.*
" Q—*Did you find any water in the slough?*
" A—*Yes, sir.*

T., IV, fol. 201–3.

" *The next day we went back*
" *to the swamp again; this was last Saturday; the 14th*
" *day of May.* The next day was Sunday and we went
" back to the swamp; we went down the levee of the Kern
" Valley Water Company until we passed the East Side
" Canal. *We got out of the wagon and walked down in*
" *the general direction of the slough about opposite*
210 " *Crocker's house.* We found water in some ponds stand-
" ing before we reached Crocker's house. *I don't know*
" *that I can tell what section Crocker's house is on, it is*
" *somewhere here on Section 10, Township 30, Range 24;*
" *about that; the water was confined to the banks there;*
" *we crossed the slough near Crocker's barn;* we went to
" the well and got a drink of water, and then got over the

" fence into the barley and alfalfa field *and we followed*
" *along the general direction of the slough, I suppose*
" *nearly a mile.* The water was along the ditch in by the
" fence, and we were on the west side of the slough; near
" the slough, not immediately on the banks, but in the
211 " vicinity of the slough; in sight of the tules all the way
" down; *we did not get to the slough until we got I sup-*
" *pose nearly a mile below Crocker's house; then we got*
" *right into the slough,* and there we struck the levee;
" followed the levee back towards Crocker's house right
" up to the barn again; right where we had started from.
" Q—*Where was that levee in reference to the slough?*
" A—*It followed the general direction of the slough*
" *not along the bank all of the way; at times touching*
" *the main slough on the west side.*
212 " Q—How were the banks of the slough along that
" levee between that levee and the slough?
" A—Well, in places on the east side of the levee we
" could see the water standing in low places on the east
" side of the levee.
" Q—Was the water in the slough or out of it?
" A—We could not see; I suppose it was out of the
" slough; there seemed to be marshy places.
" Q—Well, how was the west bank of the slough along
" there? What did you see from the levee?
" A—The west bank of the slough?
" Q—Yes, sir; on the east side of the levee; I under-
213 " stand you the levee was on the west side of the slough.
" How was the bank of the slough between the levee and
" the slough itself? How was the west bank of the
" slough along there that you could see?
" A—*For some distance we did not go to the main*
" *slough at all, or to the bank of the slough; from this*
" *levee we followed down the levee, right on the levee;*
" *the levee touched the slough in some points right up*
" *to the bank of the slough.*
" Q—How was the bank at this point where it touched?
" A—Well, the bank was the levee itself in places; no
214 " natural banks there outside of the levees.
" Q—No natural banks there?
" A—None that I could see, except the levee; the water
" was up against the levee, and in places we found the
" water standing on the east line of the levee for some
" distance.
" Q—Did the levee keep the water in the general course
" of the slough there?
" A—I should say it did. After going back to Crock-

" er's, we then started and got over the fence right at that
" barn, and started right down the levee again, north-
" ward; we followed that out to the end of the levee; that
215 " was about a mile, or something over a mile, I should
" judge; the levee runs out on high ground and we fol-
" lowed then the direction of the slough a few hundred
" yards; we found water on our left—that is, to the west;
" we followed the slough in a northwesterly direction;
" the water to the left was not in a channel; it seemed to
" be a low, marshy place; it did not seem to have any cur-
" rent when we first saw it; we continued along down the
" slough until we found——. I could not determine the
" width of the water to the left of us. As far as we could
" see the tules were all grown up there to our left, so that
" I could not see the outer edge of the water, the extreme
216 " western edge; before we reached that point we found
" water in the tules along on the west side of the levee,
" before we reached the end. One place that I noticed
" particularly was where the fence crossed in this direc-
" tion, I suppose running east and west. There was a
" large pond there. Most of the fence was under water;
" the levee there ran right across to the eastern edge of
" the pond, between the pond and the slough; the levee
" extended clear across between the pond and the slough;
" there was no opening there through the levee; the pond
" was probably a half or quarter of a mile from the
" northern end of the levee.

217 " Q—*After you reached the northern end of the levee,*
" *where did you go?*

" A—*We followed the direction of the slough on the*
" *high ground. The levee runs out on high ground; that*
" *high ground was the bank of the slough*; that extended
" a few hundred yards in a northwesterly direction until
" we came to water again on our left; then we went down
" until we came where the water runs out of the main
" slough in a westerly direction. The first place we struck
" it, I suppose it was five or six feet in width, and no
" depth, running out westerly; then on the north side of
" that low place that ran out there, was another piece of
218 " high ground that extended along for some distance,
" and then, on the opposite side of that, the water ran
" out again; and we crossed that water. We followed
" the slough in the water the most of the time; we were
" on foot.

" Q—*Did you go into the slough at all?*

" A—*Yes, sir.*

" Q—*How deep was the slough below the level of the*
" *country where the water was spreading out?*

" A—*We did not cross the slough; we waded along the*
" *edge of it. It varied in depth; just at that particular*
" *place though, it was waist deep.*
" Q—*Did you go along in the slough at all going north-*
219 " *ward?*
" A—*Yes, sir.*
" Q—*How was the bottom of the slough in different*
" *places compared with the outside country where you*
" *found water?*
" A—*Well, in places where we waded in it, where this*
" *water was running out, there was not a great deal of*
" *difference right at the edge of the slough between the*
" *depth of water in the slough and that outside. I*
" *suppose it would be if we had gone across, we would*
220 " *have found it deeper; I don't know. From there we*
" *followed the direction of the slough in a northwesterly*
" *direction,* and went down to the willow tree that is on
" the edge of Weed Island in that vicinity; and when we
" came to one of those places where the water ran out of
" the slough, we followed it along and waded across it.
" And where the water had run out of the slough, there
" was no channel; it was all grown up with tules; I could
" not see any channel.
" Mr. Haggin. Q Well, was there any channel there?
" A—Well, there were depressions that carried the
" water off; there had to be. The water was flowing from
221 " the slough in a westerly direction.
" Q—Were there any banks to those depressions, any
" defined banks at all?
" A—We would find sometimes high ground on the
" south side, and sometimes on the north side, there was
" *also high ground on the north and south in these places.*

T., IV, fol. 209–221.

" Cross-examination of
"
227 "

L. Crusoe.

" Mr. Houghton. Q.—You say you crossed the slough
" at Bonestell's house?
" A—Yes, sir, south from Bonestell's house, a few
" hundred yards. We found the water confined to the
" banks where we crossed it there.
" Q - How deep was it?
" A—It ran into the bottom of the buggy.
" Q—How wide was the slough there?
" A—*I suppose* 50 *or* 60 *feet wide.* And from there
" we went to Bonestell's house; and from Bonestell's

228 " huse we went in a northwesterly direction; we drove
" along westerly in the direction of the slough; we were
" not on the immediate bank of the slough in going from
" Bonestell's house."

T., IV, fol. 227–8.

" Q—The second day that you were down there, when
" you drove along that levee—you went down the east
" side, as I understand you, on the slough?
" A—*Yes, sir; until I came to a point right opposite*
" *Crocker's house, and I crossed the slough at that point.*
" Q—*How deep did you find the water?*
" A—*I did not wade it there; we crossed on a wire*
" *stretched across with some old panels on it.*
" Q—*How wide was it at that point where the panels*
230 " *were?*
" A—*I think it was fifty or sixty feet wide.*
" Q—*Did you measure the depth of the water there?*
" Q—*We ran a stick into it.*
" Q—*How deep was it?*
" A—*About six feet, I think.*
" Q—*Was there a current at that point?*
" A—*Yes, sir; a sluggish current.*
" Q—*How was it at the place above Crocker's?*
" A—*About the same; probably more of a current at*
" *Crocker's than below.* We went along the fields below
231 " Crocker's about a mile to the north, and there struck
" the slough and came on the levee; *the levee followed*
" the general course of the slough.
" Q—*It didn't follow along the slough?*
" A—*Well, it didn't follow the banks.*
" Q—*How many times did it touch the banks of the*
" *slough from the point where you got on to it until you*
" *got back to Crocker's?*
" A—*I don't remember how many times between the*
" *time we got on to it, and when we got back; I did not*
" *count them; probably three or four times.*
" Q—*Did you measure the water in the slough at any*
" *point where the levee touched the slough?*
232 " A—*I did not.*
" Q—After getting back to Crocker's, where did you
" then go?
" A—We went right back, retraced our steps down this
" levee, and after going to the end of the levee went over
" a few hundred yards on high land, and then came to
" water running out in a channel, or watercourse, or
" depression that was about five or six feet wide.

" Q—Then, going from there along that elevation, you
" came to another depression like it, with water running
" out?
" A—Not like the other one.
233 " Q—What was it?
" A—It was much wider and deeper. *After leaving*
" *that we followed the general direction of the slough*
" *clear down to Weed Island, to the Willows. I don't*
" *think I know what section the Willows are on; the Wil-*
" *lows are probably (referring to map), I think they are*
" *somewhere about Section* 32, *Township* 29, *Range* 24;
" *on the south half, I think.*
" Q—You said, Mr. Crusoe, then when you reached
" these little channels, where the water was running out
" to the west, before you reached the island, you waded
" out into the main slough—how far did you wade out?
" A—Times, I suppose I was half way out.
234 " Q—You did not cross it at all?
" A—I did not cross.
" Q—After getting down to the willows, where did you
" then go?
" A—We followed the line of the old ditch or the canal
" up to the East Side Canal, we were then on the east
" side of the slough.
" Q—How did you get across?
" A—*We waded across the slough right at the Willows.*
" Q—*How deep was the water there?*
" A—*It was within a few inches of our armpits.*
235 " Q—*How wide was it?*
" A—*About* 60 *or* 70 *feet wide.*
" Q—*Was there a current there?*
" Q—*Yes, sir.*

T., IV, fol. 229–35.

" We stopped at the Willows, and then
" went off in a southeasterly direction from the Willows.
" Q—You say that the second channel, *after passing*
" *this island where the water was running out to the west,*
" *was deeper. How deep was that channel?*
" A—*Well, in places it was waist deep.*
" Q—*Was there water running when you waded this*
" *crossing at the Willows?*
" A—*Yes, sir; there was some current there.*
" Q—*Who was with you on that trip?*
" A—*Mr. Macmurdo; no one else.* From the time we
238 " left Crocker's until we got across the slough we were
" alone. Mr. Macmurdo was also with us on the first

" day. The first day we drove over there in a buggy.
" On the second trip we were alone after we left this
" levee there before we got to the Headquarters camp."

T., IV, fol. 237–8.

Mr. FILLEBROWN, an employee of Mr. Haggin, is also sent down to Buena Vista Slough, after plaintiffs had closed their case, to examine it from Wible's Headquarters to the Bonestell House.

He testifies:

" Q—Were you last Saturday or Sunday in any portion
" of this body of swamp land, north of Wible's Camp, in
" that vicinity, around Wible's Camp?
" A—I was, last Sunday.
" Q—Whereabouts did you go last Sunday in the
" swamp land?
241 " A—I followed along the levee of the Kern Valley
" Water Company to the head-gate, or to the head-gate
" of the East Side Canal. I think I went beyond that
" down to the slough, and followed down that slough to
" the bunch of willows, on what is known as Weed
" Island, I believe. That is, I followed the slough a
" part of the time; went along through the swamp lands.
" The levee of the canal that I followed [referring to
" Map D], runs along the north line of Section 24, T.
" 30, R. 24. We traveled along the levee until we came
" to the waste-gate, which discharges in the old slough
" on the north side of the Kern Valley Canal. That
242 " levee represents the north bank. We traveled on that
" levee. We first went to the East Side Canal, and then
" went beyond that to the slough.
" Q—Went on beyond that to the slough. Was that
" the main slough there, do you know?
" A—Well, it had the appearance of being.
" Q—Is that the slough that runs right up in the vicin-
" ity of Wible's Camp?
" A—Yes, sir. We left the levee there near the head-
" gate, the waste-gate discharging into the slough; that
" is on the levee of the main canal at the waste-gate.
" From there we followed down the slough. We kept
243 " right along close to the bank of the slough to a point
" opposite Mr. Crocker's house, and a little below there,
" two or three hundred yards. We were on the east
" bank, or the northeast. I believe Mr. Crocker's house
" is on Section 15, T. 30, R. 24, very near the north

" line, on the northwest quarter [points it out on Map
" D]. In going along the east side, opposite Crocker's
" house, we struck a little overflow from the slough,
" which was almost stagnant, moving very slowly out
" from the slough. It was running in no channel. It
" was spreading out a good deal on the east side of the
244 " slough. We went on down the banks of the slough as
" well as we could, and came across a great many of
" these short bends, and here and there we found
" water. We went out to the edge of it, and in some
" places waded through it; we generally waded through
" it to save a great deal of distance. The first place
" we came to water below this place opposite Crocker's,
" was 200 or 300 yards below Crocker's house.
" Q—Was that water that you found in the slough?
" A—No, sir; when I speak of finding water I mean
" outside of the slough. There was water in the slough.
" This water was on the outside of the slough; on the
245 " east side. It was not in any channel on the east side
" of the slough. It was all spread over the tules.
" Q—Where did this water come from that was spread-
" ing out over the tules?
" A—It came from the slough overflowing its banks.
" We found such places very frequently from there down.
" I could not state how many. There were here and there
" high points in the banks where they were not overflowed,
" little islands all along among the tules which were not
" covered with water, and, generally speaking, the ground
" outside of the bank of the slough was covered with
" water from there down. I was walking on the bank of
246 " the slough on the east side. I never confined myself
" to the banks of the slough. We cut across these points.
" In many places we were away back a quarter of a mile,
" perhaps, or more, from the slough, and we would strike
" these overflows.
" Q—Then, how far did you follow generally the slough
" there?
" A—We followed it down to the willows on Weed Is-
" land.
" Q—Whereabouts were the willows; can you fix it on
" this map where they were?
247 " A—I am not positive; but I think they were at the
" sharp bend, on the southeast quarter of Section 32.
" That is about the distance that I estimated we had
" traveled, and they were at a bend similar to that where
" it takes a sharp turn to the westward.

T., IV, fol. 240–7.

* * * * * *

" Q—In going along there from Wible's Camp up
" through to the willows, can you state from your obser-
" vation of that country, whether or not there is any
" slough, or water channel, east of this marked as the
253 " main slough there?
" A—No, sir.
" Mr. McAllister. Q—What "marked main slough"
" do you mean? I suppose he means marked Buena
" Vista Slough?
" Mr. Haggin. Marked Buena Vista Slough on this
" map D.
" Mr. McAllister. What point do you refer to?
" Mr. Haggin. From this point here up to where he
" struck the willows. I asked him whether there was
" any slough on the east side of this marked "main
" slough."
" The Witness. No, sir. I was unable to find any
254 " channel, at all."

T., IV, fol. 252–4.

Referring to the cross-section run by him from the southeast corner of Sec. 28, T. 29, R. 24, S. 16°, W. across the body of the swamp land, he says:

"My levels began at the southeast corner of Sec-
" tion 28." (Fol. 289).

He then gives the elevation of each station, until he comes to Buena Vista Slough.

He then testified:

" 97.6
" "in Buena Vista Slough." That point in a short bend
" in the end of the slough, not in the centre; and the
" elevation was 97.6--Station No. 103.
" Mr. Haggin. Go on.
" A—Station 104 is 98.6, 98.4; at the right bank, water
295 " 0.2 feet deep; 95.5, that is station 106; "bottom of slough
" near left bank, deepest water, 2.9 feet," without any
" material increase in distance; that is right up the
" bank, the west bank being nearly vertical. We have
" an elevation 99.5 at the point on the left bank, making
" the bank 4 feet higher than the bottom of the slough.

T., IV, fol. 294–5.

* * * * * *

301 " Q—What station was it you came to this portion of
" the slough, hole, or whatever it was, shown on the
" profile to be 11,000 feet from the initial point?

" A—At Station 103, represented on the profile, is a
" lower point than any preceding point in Buena Vista
" Slough. That is the point that came in the water near
" the right bank of the slough, not in the centre of the
" slough; but it was the best place we could get. We
" could not get a point at that particular station.
" Q—What do you mean by the right bank?
" A—In speaking of the right bank of a water-course
" it is always understood that we are passing down the
302 " stream. In this case it would be the east bank.
" Q—How wide was that slough at that point?
" A—We did not cross the pond at exactly that point.
" It was simply a bend in the slough; and we just cut
" across the edge of it; and then our next elevation was
" up on the high ground; the usual ground surface still
" on the right bank of the slough.
" Q—I see in this that there is a depression for nearly
" 500 feet on the profile. Do you mean that there was
" that width of a slough there—500 feet?
" A—I mean that the point I estimated as being in
303 " the slough was just in the water, in the edge of the
" slough some 10 or 12 feet from the bank there. Then
" the next points, that is 104 and 105, were higher up
" the bank, but still not quite as high as the general
" ground surface, the bank being quite a slope on the
" east side. Station 105 was at the edge of the water,
" where the water was .2 of a foot deep.
" Q—From Station 103 to Station 104 in that 100 feet
" between those stations? Did you find any point of
" higher elevation than these you have mentioned be-
" tween stations 103 and 104?
" A—No, sir; there is a difference of one foot about;
304 " and no intervening points that vary materially between
" the two—one being low down in the water, and the
" other out of the water on the bank of the slough.
" Station 105, 98.4 was just at the edge of the water, and
" it was .2 of a foot deep. I do not mean that the slough
" was 500 feet wide there. I did not mean anything of
" the kind, but that the elevation of Station 103 is 97.6;
" there we happened to come into a little bend in the
" slough that we could cross—a little sort of a bay. We
" got across that, and took our point down in there for
" two reasons—we wanted to see how deep the water was,
305 " and for another reason, that on that bank would have
" been considerably off our line and a very dense growth
" of nettles. As near as I can remember, the slough
" was 50 or 60 feet wide The notes will show pretty

"nearly. No, sir; it is very nearly 100 feet wide where
"we crossed it; we crossed it a little diagonally. The
"slough would be about 60 feet wide. My notes show
"that Station 105 is at the edge of the water; but, going
"over 103 and 105, it goes diagonally across a little bend
"in the slough, and the next station strikes the high
"ground on the banks of the slough, on the same bank
"of the slough. Then our crossing of the main
306 "slough, went from Station 105 to 106, being just
"100 feet in the direction in which we crossed it.
"We crossed it at an oblique angle, but Station 106
"was in the bottom of the slough, near the left bank.
"The deepest water was 2.9 feet, and the elevation at
"the bottom there being 95.9. Then, only a foot or
"two further we took a point on the west bank of the
"slough, the bank being quite abrupt, 99.5. The last
"elevation before that was 95.5, the bottom of the slough,
"and then 99.5, at the main bank, quite an abrupt bank
"on the west. We just struck that particular point in
"the slough by following our line. We struck it in our
"direct line, and crossed it where we first met it. We
307 "had no prospect of any better crossing. After cross-
"ing the slough we had two stations of high ground
"until we reached Station 110, where the water was .2
"of a foot deep."

T., IV, fols. 301-7.

"On cross-examination the witness testified:
"When I was down
"on Buena Vista slough last Saturday, I followed along
"on the north side of the main levee of the Kern Val-
"ley Water Co. to a point where the water runs through
"a weir and into the slough, and then followed that
323 "slough down. I followed it there along the slough, or
"along the overflowed ground, down to the Willows on
"Weed Island, but not on the slough all of the way.
"I was on the east side of it all of the time; did not
"cross it at all. The slough was 40 or 50 feet wide where
"it was taking water from the weir, I guess. I don't
"know how deep the water was right there at the gate.
"I did not measure it. I did not measure the water
"along there, at any point between that point at the
"Norton House and the slough. It is dsfficult to state
"the average width of the slough from the weir down to
"Norton's or Crocker's, it is so variable. It varies
324 "all of the way from 35 to 60 or 65 feet, perhaps. It is
"very irregular in its width. In following down there
"I did not keep on the slough all the way.

" Q—Did you measure the depth at any point on the
" slough down there on Sunday?
" A—No, sir; I did not.
" Q—Did you measure the depth of the slough at any
" point?
" A—No, sir; I followed the slough down to the Wil-
" lows. I cannot locate the Willows positively. I think
" they are located at the sharp bend in that slough on
" the southeast corner of Section 32; but I am not per-
" fectly sure as to that. I never made any careful sur-
325 " vey of that country. The artificial channel which I
" found down there was at a distance of 300 or 400 yards
" to the eastward of the Willows, I think.
" Q—Then the cut that is there on Map D would not
" represent the channel that you found there?
" A—No, sir; I don't think it would, if the Willows
" are located where I think they are. The channel was
" east of the Willows some 200 or 300 yards."

T., IV, fol. 322–5.

Referring to the cross section from the southeast corner of Section 28, he says:

" I have
" no special note at 102. The elevation at station 102 is
" 98.9; at 103, 97.6; this is the second level.
346 " Q—What did you find there?
" A—That was in the side of the slough, probably 10 or
" 12 feet, perhaps 15, more or less. I am not positive of
" the distance to the bank. I did not note the depth of
" the water there. The rod man was some distance from
" me. As I walked through it, it was about one foot deep,
" but I made no note of it. I did not cross the slough at
" that point. The next station was on the same side of
" the slough.
" Q—In running that station, how did you measure the
" distance between the two?
347 " A—Simply by pacing it. The rod man paced it as near
" as he could through the water. He went directly from
" one station to the other. The water was perhaps a foot
" deep, and from that to nothing. He kept right along by
" the side of the slough, as close as he could keep—as near
" a straight line as he could; 105 came just in the edge of
" the water, where it was two-tenths of a foot deep, still
" on the east side of the slough. I crossed the slough at
" that point. The deepest water in the slough was 2.9
" feet. I measured that. On our line, it was 100 feet, as

" near as we could pace the distance. The water was run-
" ning there; some current, but not a very rapid current;
348 " quite sluggish in fact. The banks were about one and a
" half feet; no, sir, about one foot. The right bank was
" just about one foot above the water. That is, left bank,
" the west bank. I made no note of it, not in those words,
" but the level notes themselves show it. The bottom of
" the slough was 95.5, water 2.9 deep. That would make
" the surface of the water 98.4; the top of the bank 99.5;
" making a difference of 1.1.

" Q—What kind of banks were there on the slough at
" that point?

" A—The western or left bank was quite a solid, well
" defined bank. The right bank was a more gradual slope.
349 " It was not so well defined. The water was not overflow-
" ing the banks at that point where we crossed; but there
" was overflowed ground, which we crossed just before we
" reached the slough. After crossing the slough we kept
" on the same course south 16 deg. west, as near as we
" could. We did not set an instrument through those tules,
" but we took a very distinct plain mark in the mountains,
" to the southwest of it, which we could see all the time.
" We did not run a direct course through; not after we
" reached the point I speak of, because we could not get
" our team through; the tules were very high there.

350 " Q—How could you see anything through those tules if
" they were 10 or 12 feet high?

" A—By breaking down the tules a little in front of
" you you could see a long way, if your objective point is
" high enough to see over the tops of them, we followed
" on in that way.

T., IV, fol. 346 to 50.

* * * * *

351 " A—The first point that I noted that I made a deflec-
" tion was at Station 92. Then we came back into the line
" again as soon as possible. But in going through the dense
" tules and overflowed ground, after ceasing to take levels,
" my route was more or less devious through the tules, and
" I did not follow any regular course until I got to the dry
" ground on the opposite side. Then I knew where I was,
" and on a connected track. The first water that we came
" to on the east side of the slough—the first moving water;
" overflow, one to six inches, was at Station 82 about; that
" was very slowly moving north. After crossing Buena
Vista Slough, the first water was at Station 110, where it

"was two-tenths feet deep, and at Station 111 it was six-
"tenths feet deep.

T., IV, fol 351.

Referring again to his trip down Buena Vista Slough, the witness says:

"Q—When you speak of your Saturday's trip, of going
"down the levee and then, after going down the levee
"sometime, coming to Buena Vista Slough, and then from
"that slough down to the Willows, do you mean that in
"that connection you followed the swamp land, or that
"you followed the water channel?
"A—In the first place, I have not referred to any trip
"on Saturday. It was Sunday, but I do not really mean
"either one.
370 "Q—You didn't mean to say—
"A—[Interrupting.] I did not mean that I followed ex-
"actly the channel of the slough or the margin of the
"swamp land.
"Q—You referred to something that you styled a
"slough, as following close to it.
"A—Yes, sir.
"Q—Opposite counsel seem to make it appear that every
"time you refer to a slough there, you refer to the whole
"body of swamp land. I want to know if, when you said
"that on Sunday you went down along the west side of
"the levee, and came to the slough, and followed that
"slough, or along on that slough until you came to the
371 "Willows, what did you mean by slough?
"A—When I said "slough," I meant the slough. That
"is that all along through there, the slough has a channel
"which is well defined along there by the Crocker place;
"and I followed close to the banks of that channel in
"places, but in other places I departed from it a consider-
"able distance, in order to cut off these long bends re-
"ferred to, and finally struck this levee, and followed that
"because it was easier traveling, and I could see the coun-
372 "try better from that levee than in the tules, which were
"there, all along down there, between this levee and the
"channel.
"Q—When you started on this leveling trip across from
"Section 28, and say that you came to Buena Vista
"Slough, what do you mean?
"A—I mean that I came to this same slough that I re-
"ferred to, that was up to the Crocker place."

T., IV, fol. 369-72.

On re-direct examination:

" Mr. HAGGIN. Q—You speak of going to a slough. I
" understood you in your testimony all the time, to be re-
" ferring to what is described on Map 'D,' and marked
" 'Buena Vista Slough?'
" A—Yes, sir.
" Q—Do you know anything about Buena Vista Slough,
" independent of that mark on Exhibit 'D,' yourself?
" Q—If I was to come to it in a strange country I would
" not know the name of it as Buena Vista Slough. At the
" time I made these cross sections and run those levels, I
" did not notice the amount of water that was flowing
" through the waste-gate at Wible's Headquarters, not on
" that particular day."

T., IV, fol. 373-4.

We call attention to a very significant fact that apears in connection with the testimony of these three witnesses; Macmurdo, Crusoe and Fillebrown, the only witnesses called by defendant who had examined Buena Vista Slough from Wible's Headquarters to the Bonestell House. They all went there to examine that water channel between those two points, and to testify in this case. Still, it appears that not one of them measured the depth of the channel or the water running in it, nor did they measure its width at a single point.

On cross-examination Macmurdo says of the slough at the DeWebber Road Crossing:

" We then
" went first to the DeWebber place, and from there to
" Bonestell's. We did not go there direct from one
" point to the other. We went directly to the slough,
1271 " and from there to Bonestell's. We reached the slough
" some distance south of Bonestell's; probably a mile.
" We did not cross it where we first reached the slough.
" One reason was that we did not know whether we
" could cross, on account of the bogs there, and another
" was that we wanted to go to the Bonestell House. *We*
" *did not measure the depth of the water at the point*
" *where we first reached the slough. We had measured*
" *it before that, at the same point, in* 1880. *I don't*

"*remember exactly how deep it was then. It was*
"*about one and a half or two feet; the bank at the*
"*point where we reached it was* 3 *or* 4 *feet high, and*
"*there was more water in it than there was in* 1880."

T., IV, fols. 1270–1.

Of the slough at Bonestell's, he says:

"Crossed near Bonestell's.
"Drove right through the slough where the horses had
"been crossing. We saw tracks across.
"Q—How deep was the water where you drove across
"there?
"A—It was 2 feet deep. It came up to the hubs of
"the buggy. As I recollect it, that was all. I don't
"think it came higher than that. It did not come inside
"of the buggy. Mr. Cruso was with me in the buggy."

T., IV, fol. 1272–3.

Of the slough at Norton's place, he says:

"I was down there again with Mr. Crusoe the follow-
"ing day. We went down where the levee crossed the
"slough near the Headquarters' Camp.
"Q—Did you go down into the line of the slough?
"A—Yes, sir; on the east side. We followed along
"on the east side until we reached the Headquarter
"place—that is, the Norton place,—and we crossed
"there and went across on a wire stretched across the
"slough.
"Q—*How deep was the water at that point?*
"A—*The water was—I don't remember exactly. They*
"*measured it. I did not measure it myself, and don't*
"*remember. It was about five or six feet deep.*
"Q—*How wide was it at that point?*
"A—*I did not measure it; probably* 50 *feet.*
"Q—*How wide was that slough where you crossed it*
"*at Bonestell's?*
"A—*I cannot say; probably not over* 30 *or* 40 *feet.*"

T., IV, fol. 1274–6.

Of the slough at Willows, he says:

"When I was down there with Mr. Crusoe, we were
"on the west side, and crossed to the east; crossed it on
"Section 32, near the Willows. The water at that point
"was out around the Willows some distance; shallow

" water. It is hard to tell how wide the slough was at
" that point where I crossed. The running water in the
" slough there was probably 60 feet wide; it was waist
" deep.
" Q—Wasn't it more than waist deep?
" A—I don't think it was; it may not have been so
" deep. The mud was in the bottom about 1½ feet deep;
" and that made the water come over my waist; but the
" mud was a foot and a half deep. We waded across,
" and the water came just over our waist. It did not
" come up to our arms; between the waist and arms."

T., IV, fol. 1279–80.

Crusoe, who accompanied Macmurdo on this trip, says of the slough at Bonestell's:

" Mr. HOUGHTON. Q—You say you crossed the slough
" at Bonestell's house?
" A—Yes, sir; south from Bonestell's house a few
" hundred yards. We found the water confined to the
" banks where we crossed it there.
" Q—How deep was it?
" A—It ran into the bottom of the buggy.
" Q—How wide was the slough there?
" A—I suppose 50 or 60 feet wide."

T., IV, fol. 227.

Of the slough at the Norton or Crocker place, he says:

" Q—The second day that you were down there, when
" you drove along that levee—you went down the east
" side, as I understand you, on the slough?
" A—Yes, sir; until I came to a point right opposite
" Crocker's house, and I crossed the slough at that point.
" Q—How deep did you find the water?
" A—I did not wade it there; we crossed on a wire
" stretched across with some old panels on it.
230 " Q—How wide was it at that point where the panels
" were?
" A—I think it was fifty or sixty feet wide.
" Q—*Did you measure the depth of the water there?*
" A—*We ran a stick into it.*
" Q—*How deep was it?*
" A—*About six feet, I think.*
" Q—Was there a current at that point?
" A—Yes, sir; a sluggish current.

" Q—How was it at the place above Crocker's?
" A—About the same; probably more of a current at
" Crocker's than below. We went along the fields below
" Crocker's about a mile to the north, and there struck
231 " the slough and came on the levee; the levee followed
" the general course of the slough.
" Q—It didn't follow along the slough?
" A—Well, it didn't follow the banks.
" Q—How many times did it touch the banks of the
" slough from the point where you got on to it until you
" got back to Crocker's?
" A—I don't remember how many times between the
" time we got on to it and when we got back; I did not
" count them; probably three or four times.
" Q—*Did you measure the water in the slough at any*
" *point where the levee touched the slough?*
" A—*I did not.*

T., IV, fol. 229–31.

* * * * *

" Q—You said, Mr. Crusoe, that when you reached
" these little channels, where the water was running out
" to the west before you reached the island, you waded
234 " out into the main slough—how far did you wade out?
" A—Times, I suppose, I was half way out.
" Q—*You did not cross it at all?*
" A—*I did not cross.*

T., IV, fol. 233–4.

Of the slough at the Willows he says:

" A—We followed the line of the old ditch or the canal
" up to the East Side Canal; we were then on the east
" side of the slough.
" Q—How did you get across?
" A—We waded across the slough right at the Willows.
" Q—How deep was the water there?
" A—It was within a few inches of our armpits.
235 " A—How wide was it?
" A—About 60 or 70 feet wide.

T., IV, fol. 234–5."

He says, in answer to the question:

" Q—Who was with you on that trip?
" A—Mr. Macmurdo, no one else. From the time we
" left Crocker's, until we got across the slough, we were

" alone. Mr. Macmurdo was also with me on the first
" day. The first day we drove over there in a buggy,
" On the second trip we were alone after we left this
" levee there before we got to the Headquarter's
" Camp."

T., IV, fol. 238.

Still, Macmurdo says:

" They measured it. I did not measure it myself,
" and don't remember."

Fol. 1275.

Of the trip he made on the slough from Wible's Headquarters to the Willows, Fillebrown says:

" When I was down
" on Buena Vista Slough last Saturday, I followed along
" on the north side of the main levee of the Kern Val-
" ley Water Co. to a point where the water runs through
" a weir and into the slough, and then followed that
323 " slough down. I followed it there along the slough, or
" along the overflowed ground, down to the Willows on
" Weed Island, but not on the slough all of the way.
" I was on the east side of it all of the time; did not
" cross it at all. The slough was 40 or 50 feet wide where
" it was taking water from the weir, I guess. *I don't*
" *know how deep the water was right there at the gate.*
" *I did not measure it. I did not measure the water*
" *along there, at any point between that point at the*
" *Norton House and the slough.* It is difficult to state
" the average width of the slough from the weir down to
324 " Norton's or Crocker's, it is so variable. It varies
" all of the way from 35 to 60 or 65 feet, perhaps. It is
" very irregular in its width. In following down there
" I did not keep on the slough all the way.
" Q—*Did you measure the depth at any point on the*
" *slough down there on Sunday?*
" A—*No, sir; I did not.*
" Q—*Did you measure the depth of the slough at any*
" *point?*
" A—*No, sir;* I followed the slough down to the Wil-
" lows. I cannot locate the Willows positively. I think
" they are located at that sharp bend in the slough on
325 " the southeast corner of Section 32; but I am not per-
" fectly sure as to that. I never made any careful sur-
" vey of that country."

T., IV, fol. 322-5.

Fillebrown is once asked the width of Buena Vista Slough where he crossed it, *i. e.*, at the point on Sec. 4, T. 30, R. 24, crossed in running the cross-section line from the S. E. corner of Section 28, T. 30, R. 24. He had testified that the stations were all 100 feet apart. That station 105, elevation 98.4, was "at the "right bank, water 0.2 feet deep; 95.5, that is, station "106, 'bottom of slough, near left bank, deepest "water 2.9 feet,' without any material increase in dis- "tance; that is right up the bank, the west bank, "being nearly vertical. We have an elevation of 95.5 at the point on the left bank."

T., IV, fol. 294–5.

This, of course, would show a slough over 100 feet wide and 4 feet deep, and that, too, on Section 4, just where the defendants claim it is least well defined. This would never do, so for once, on direct examination, a witness is asked to give the width of Buena Vista Slough, and see what he says:

"As near as I can remember, the slough "was 50 or 60 feet wide. The notes will show pretty "nearly. No, sir; it is very nearly 100 feet wide where "we crossed it; *we crossed it a little diagonally.* The "slough would be about 60 feet wide. My notes show "that station 105 is at the edge of the water; but, going "over 103 and 105, it goes diagonally across a little bend "in the slough, and the next station strikes the high "ground on the banks of the slough, on the same bank "of the slough. Then our crossing of the main "slough went from station 105 to 106, being just
306 "100 feet in the direction in which we crossed "it. We crossed it at an oblique angle, but station "106 was in the bottom of the slough, near the left bank. "The deepest water was 2.9 feet, and the elevation at "the bottom there being 95.9. Then, only a foot or "two further we took a point on the west bank of the "slough, the bank being quite abrupt, 99.5. The last "elevation before that was 95.5, the bottom of the slough, "and then 99.5, at the main bank, quite an abrupt bank "on the west."

T., IV, fol. 305–6.

This certainly is very remarkable testimony to be given by a civil engineer who runs a level line across a country for nearly three miles to find the water course that crosses such line, and finding but one, he fails to measure its width, and when asked to give the width
1241 of the very channel he went to measure, says:

"As near as I can remember, the slough was 50 or "60 feet wide. The notes will show pretty nearly. No, "sir; it is very nearly 100 feet wide where we crossed "it; we crossed it a little diagonally. The slough would "be about 60 feet wide."

T., IV, fol. 305.

It will be seen that Macmurdo was not questioned about the slough that was found in running this line.
1248 All he says is:

"Where "we struck it, it was 2.7. I think, about waist deep.
"Q—Do you know where that was you struck that?
"A—It was on Section 4, at some point. I can point "it out on Map I. [Witness does so."]

T., IV, fol. 1119.

He also, on cross-examination, draws a line on Map "B," showing the course taken by himself in making the cross section from the S.E. ¼, Sec. 28, and across
1249 Buena Vista Slough, on Section 4, "a little diagonally," as Fillebrown says (fol. 305), and it appears that it was a *very little* diagonally.

The distance across the slough on the line taken was over 100 feet, as both stations 105 and 106 were in the slough, but suppose it was only 100 feet from bank to bank, the crossing would have to have been on an angle of 53° to make the slough but 60 feet wide.

Walter James, for defendant, a civil engineer and surveyor, testified, that he first went on Buena Vista Slough in May, 1871. He says:

123 "I came there to the Buena Vista Slough, and we "found the water flowing there; I am speaking about

" Section 2, Township 30 south, Range 24 east; to get
" there we crossed New River; I cannot really say where;
" we traveled down New River several hours, hunting
" for a place to cross, and finally crossed it at a place
" that was not very good; I have never been able to find
" that place since; I think we crossed two channels;
" there was a great deal of water flowing in the first
" channel that we crossed; I don't remember how deep
" it was; I should say it was one hundred and fifty or
" two hundred feet wide, and two or three feet deep; we
" had a wagon and some mounted men.
124 " Q—How deep and wide was the second channel
" which you refer to?
" A—I think it was very nearly the same as the first;
" I don't remember that we crossed any other channel.
" Q—*You say you went to Section* 2, *Township* 30 *South,*
" *Range* 24 *east; what did you find there?*
" A—*There was water there running in the slough.*
" Q—*What kind of a slough?*
" A—*A narrow slough, and quite crooked;* we under-
" took to follow the slough down, and found the water
" flowing out all over the country.
" Q—*Which way did you follow the slough?*
125 " A—*We traveled, as near as I remember, northwest-*
" *erly along the slough;* I know where the body of swamp
" and overflowed land is which lies in District 121; the
" point that I speak of is a place in that body of land,
" on or about the section I have mentioned; where I first
" struck it; the portions of it where the water was not
" flowing were dry; the tules were mostly burned off; it
" was tule land.
" Q—Then you followed the slough northward, you
" say?
" A—Yes, sir.
" Q—How far?
" A—Perhaps half a mile; at the end of this half mile
126 " there was a change; we then came to the water that was
" spread out over the tule land; I cannot say how wide;
" we could not see across it; it was spread out all over
" the tules; from there we traveled around the margin
" of the water one or two miles.
" Q—Did you find it in the same condition?
" A—Yes, sir; the water was quite shallow, and in some
" places seemed to be running, and in other places seemed
" to be standing; I cannot tell you how wide it was spread
" out there at any particular place.

T., III, fol. 124–6.

253 " *I don't know when Map H was*
" *made. The surveys from which it was made were run*
" *in* 1879. *Mr. Macmurdo assisted me in that work. Mr.*
" *Macmurdo ran the meander line; and I ran the offset*
" *line. We each of us had a party. Mr. Macmurdo ran*
" *the meander lines along all of the channels represented*
" *on Map H.*
" Q—*Did he run the meander line along the Buena Vista*
" *Slough, as represented on that map?*
" A—*Yes, sir.*
" Q—*The whole distance?*
" A—*The whole distance represented on that map.*
T., III, fol. 253.

In this connection, we call the attention of the Court to the last portion of the 72d finding:

"That the slough or channel marked on the annexed
" maps as Buena Vista Slough, is as far northward as,
" and until reaching Buena Vista Swamp, known as and
" called Buena Vista Slough; but after reaching said
" swamp and ceasing to be well defined or continuous,
" as in these findings set forth, it ceases to be distin-
" guished as Buena Vista Slough, and the term Buena
" Vista Slough is then applied to and used to designate
" the whole of said swamp, and noi any particular chan-
" nel therein."

An effort was made by defendants' counsel to have all their witnesses ignore the word "slough." Mr. Fillebrown, in testifying in relation to his trip down through the centre of this body of swamp land, was all the time "following the slough," or "coming to the bank of the slough," and so on re-direct examination counsel take the witness in hand, and undertake to show by him that he meant nothing by the word "slough." In doing so, they succeeded in calling out testimony from their own engineer and witness that negatives this 72d finding, and shows conclusively that slough and swamp are not convertible terms.

361 " Mr. Haggin. Q—You have used the word "slough" a
" number of times. In some places you speak about going
" up and down and across a slough. What meaning do you
" attach to the word "slough?" Do you mean the chan-

" nel, or what is dug out there as a channel, or the whole
" body of swamp land?
" A—That whole body of lond constitutes the swamp as
" I understand it, and down to a certain point. There is a
" water-course different from the other courses.
" Q—The only reason I asked the question was, that
" there should be no misunderstanding in the reporter's
" notes. You have used "slough," sometimes referring to
362 " the whole tract of land?
" Mr. HOUGHTON. Ask him what he means.
" Mr. HAGGIN. Q—What reason did you have when you
" said for instance—I will give you what you said—
" A—[Interrupting.] Speaking of that country down
" there, we have always understood that if we were going
" towards Tulare Lake, we were going down the slough, and
" if we were going southward, we were going up the slough.
" If we were three or four miles back from the slough,
" down the swamp land, going in that direction, we would
" say we were going down the slough.
363 " Q—In using those terms, did you have in your mind at
" the time any particular channel?
" A—I don't know anything about the existence of any
" channel there except as I have found it at points where
" I have crossed it. Where I have made the lower cross-
" section, down near Dover's camp, I found no channel that
" I could call a water channel. But still, if I was going in
" that direction, I would say that I was going down the
" slough, because it is a convenient term, and one that
" everybody understands.
" Q—Simply a term that you have agreed to use, with-
" out attaching any particular meaning to it?
364 " A—Yes, sir. If there had been no water there for
" years, yet, with the understanding that that way was
" down and the other way was up, we would say so."
" T., IV, fols. 361-4.

On re-cross examination, we succeeded in getting the witness to define what he meant by the word "slough," and in doing so, he gives testimony that must cause this Court to hold that this 72d finding is contrary to the evidence.

He testified:

" Q—When you speak of your Saturday's trip, of going
" down the levee, and then, after going down the levee
" sometime, coming to Buena Vista Slough, and then from

" that slough down to the Willows, do you mean that in
" that connection you followed the swamp land, or that
" you followed the water channel?
" A—In the first place, I have not referred to any trip
" on Saturday. It was Sunday; but I do not really mean
" either one.
370 " Q—You didn't mean to say—
" A—[Interrupting.] I did not mean that I followed
" exactly the channel of the slough or the margin of the
" swamp land.
" Q—You referred to something that you styled a
" slough, as following close to it?
" A—Yes, sir.
" Q—Opposite counsel seem to make it appear that
" every time you refer to a slough there, you refer to the
" whole body of swamp land. I want to know if, when you
" said that on Sunday you went down along the west side
" of the levee, and came to the slough, and followed that
371 " slough, or along on that slough until you came to the
" Willows, what did you mean by slough?
" A—When I said "slough" I meant the slough. That
" is that all along through there, the slough has a chan-
" nel which is well defined along there by the Crocker
" place; and I followed close to the banks of that chan-
" nel in places, but in other places I departed from it a
" considerable distance, in order to cut off these long
" bends referred to, and finally struck this levee, and fol-
" lowed that because it was easier traveling, and I could
" see the country better from that levee than in the tules,
372 " which were there, all along down there, between this
" levee and the channel."

T., IV, fol. 369—372.

We call the attention of your Honors to the significant fact that no party, sent out by defendant to cross the body of swamp and overflowed land lying along Buena Vista Slough, made a crossing at any point south of the Bonestell House. All of the crossings made by the three different exploring parties were north of the point to which Macmurdo and James had located a channel by their meander surveys.

Macmurdo and Fillebrown did cross the body of swamp land between the Bonestell House and Wible's Headquarters, in running their second level line from

the southeast corner of Section 28, T. 29 S., R. 24 E., on a course S. 16° W. On that line they crossed Buena Vista Slough at a point where it ran through Section 4, T. 30 S., R. 24 E., and there found a channel over 100 feet wide, with 2.9 feet of water running in it, with banks 4 feet high. See testimony of Fillebrown, T., IV, fol. 294–5 and 305–6.

Testimony of Macmurdo, T., IV, fol. 1115, 1319, and see folios 1325–7, where he put on Map "B" a line showing the course taken by himself and Mr. Fillebrown in running this line from SE. corner of Sec. 28, and see Map "B," with such line on it, showing the crossing to be in about the center (east and west) of Section 4, T. 30 S., R. 24 E., at the very point where counsel have made a break in the slough, or channel, upon the diagrams inserted in their brief.

What testimony have the defendants in support of the 18th finding, that Buena Vista Slough is ***"correctly and fully shown and delineated on the map "hereto annexed, marked Exhibit 'A'?"***

On that map the slough is shown as continuous from Buena Vista Lake to Section 24, T. 29 S., R. 23 E., except in this: two breaks appear in the channel of the slough, one in Section 14, one in Section 15, T. 30 S., R. 24 E.

What testimony can defendant rely upon to show that this break actually exists on Section 15?

1st. Map "D."

2d. The testimony of Mr. W. H. Souther.

MAP D.

We think this Court fully appreciates the position to which the respondents are driven when they have to rely upon Map "D" to show "breaks" in Buena Vista Slough, on Sections 14 and 15, T. 30, R. 24.

It is a position that certainly is not taken by a party

who has confidence in his case on its merits. Here is a map showing a water channel for a distance of some 15 or 16 miles. At different points are found words giving names of buildings or sections, written through the slough, and where the letters appear in crossing the channel the line of the channel is broken.

The words and breaks occur:

1. On Section 14, where the words, "Headquarters Camp," are written through the channel.

2. On Section 15, where the words, "Beginning of side canal," are written through the channel.

3. On Section 30, where the words and figures, "Sec. 30," are written through the channel.

4. On Section 30, again, where the word "Bakersfield" is written through the channel.

5. And again, on Section 24, where the word "Bonestell" is written through the slough.

Mr. McCray, who made this map, is not questioned as to these breaks. He makes, in 1878, for the Kern Valley Water Company, as the final result of his survey of this swamp land and channel, the most perfect map ("B) there is in evidence of the south end of the swamp land on Buena Vista Slough. On it these breaks do not appear on Sections 14 and 15, the map being more carefully made, and the words as a rule not crossing the channel. But on Section 14 the words do cross the channel, and are inserted so as to leave no breaks in the line of the channel.

But on Map "B," on Section 30, T. 29, R. 24, we find that this same feature appears where the figures "30" appear, they being made on a larger scale than the other figures, both channel and figures could not well appear, and therefore we have the continuous line of the channel broken the same as it is on Exhibit "D." Why did not the Court have placed on Exhibit "A"

this break in the channel of Buena Vista Slough? It appears on both maps made by McCray. McCray swears that Buena Vista Slough, down to Section 24, T. 29, R. 23, is correctly laid down on Map "B," and also on Map 2 (T., II, fol. 385), and from meander surveys made by him, and on neither of these maps appear any breaks on Sections 14 and 15. And he also testifies that there is a continuous channel from where Kern River enters Buena Vista Slough down to Section 24, T. 29, R. 23. (T., II, fol. 387–8).

We call attention to the fact that this Map "B" is produced by plaintiffs for defendant, when McCray is on cross-examination. Defendants are anxious to have the plaintiffs offer it in evidence. (T., II, fol. 468–9.) The cross-examination is suspended to enable the map to be brought into court, and when brought in, is put in evidence in connection with the cross-examination of McCray, but suddenly defendant loses all interest in it. Later in his cross-examination, he is questioned about this Map "B," and he says: "*That is the only complete map that I have made of it.*" (T., II, fol. 873.)

He says:

" Q—Now, I will ask you if Map B is the map you
" made. [Exhibiting map to witness.] This is Map B.
" Look at that and see if you made that map.
872 " A—Yes, sir; I made that.
" Q—Wasn't that map made from actual survey?
" A—That was made from actual survey.
" Q—When was this made?
" A—In 1878. The date is given upon it.
" Q—In 1878?
" A—Yes, sir; as shown on the map.
" Q—How far does that extend towards Tulare Lake?
" A—It extends into those two sections embraced on
" Map 3 in T. 27 S., R. 22 E., 2 miles.
" Q—*This map is made from parts of survey made by*
" *you?*
" A—*That is a map made from surveys made by me.*

873 " *I don't remember whether that is the only one made by*
" *me of those surveys.* THAT IS THE ONLY COM-
" PLETE MAP THAT I HAVE MADE OF IT. That
" is not the only map that I have made wherein Buena
" Vista Slough was traced as far as Section 24."
"
"

T., II, fol. 871-3.

And again, on re-direct examination, he testified:

" Q—When did you make that Map B?
1645 " A—In 1878. *That was made from field notes and an*
" *actual survey made by me, and that was my report*
" *when I handed in my map; the map was made accom-*
" *panying it; that map was the result of my survey of*
" 1877-78."

T., II, fol. 1644-5.

And he states clearly that Map "D" was made but "partially" from his field notes. (T., II, fol. 1585.) He then explains how this Map "D" was made, and for what purpose.

" Mr. FLOURNOY. We offer that map in evidence.
" [Here insert Map D.]
" Q—What time was this map made?
1585 " A—It was made about the 1st of March, 1878.
" Q—From your original field notes?
" A—Partially so, sir.
" Q—It is the map you referred to several days ago
" when you were on the stand?
" The one that you made from those notes?
" Mr. MCALLISTER. He mentioned that he made an out-
" line map.
" Mr. FLOURNOY. Q—Is that the map that you referred
" to as delivered to Mr. Souther?
" A—I didn't say I delivered any map to Mr. Souther.
" After I referred to another map I made the statement
1586 " that when I finished a certain portion of the work, and
" returned to complete the subdivisions of the swamp, *Mr.*
" *Wible had me make an outline of certain sections, and I*
" *gave it to Mr. Wible.*
" Mr. FLOURNOY. Q—*This is the map?*
" A—*I have no reason to believe that it is not.*
" Mr. GARBER. He gave that map to Mr. Wible.
" Mr. MCALLISTER. Yes, he thinks so.
" Mr. FLOURNOY. I understand that is the map you re-
" ferred to as having been made for Mr. Wible; that is your
" recollection?

" A—I don't remember just what the questions were in
1587 " relation to that, but I state here that it was a map I
" made after finishing the work that I had been sent for
" and returned to complete a subdivision of the swamp.
" *Mr. Wible stopped me, and had me make an outline map*
" *of a portion of the country.*"

T., II, fols. 1584–7.

Mr. Flournoy, in cross-examining McCray very carefully, avoids calling his attention to any particular portion of Map "D." If he wanted to qualify his statement that there was a continuous channel from Kern River to Section 24, T. 29 S., R. 23 E., why does he not ask him why a break appears on Section 15, or to explain that break? But his examination is general, and is found at T., II, fols. 1605 to 1607.

" You said, I believe that map
" No. 2, or, rather that map that I exhibited to you this
" morning, map "D," was a correct map as far as to Sec-
" tion 24, and that the balance of it was made up not with
" accurate observations?
" A—Yes, sir.
" Q—That is the case?
1606 " A—That was sketched in. That map was made em-
" bracing that country which embraces the slough up to
" Section 24. It shows more than that. I had surveyed
" up that far. I had actually meandered to that point, and
" I made outline maps of it.
" Q—This map is correct up to that point, and beyond
" that you don't know of its correctness. Is that the
" case?
" A—The map was made to show the country. *It was*
" *an outline map.*
" Q—I ask you if it is correct, this map, up to that
" point, Section 24?
1607 " A—Of what it shows, yes sir.
" Q—It was intended to show the slough, as you me-
" andered it, up to Section 24?
" A—Intended to show the slough as I meandered. I
" made the meandering of that slough, and platted it down,
" and traced it on the map.
" Q—It is correct that far?
" A—Yes, sir. I platted it down, and made surveys.

" Mr. McAllister—I want to fix this Section 24. In
" what township and range?
" A—That is in Township 29 South, Range 23 East."
T., II, fol. 1605-7.

TESTIMONY OF W. H. SOUTHER.

As it is the testimony of W. H. Souther that defendants place so much reliance upon as supporting and justifying the finding that the slough is not well defined between Wible's headquarters and Bonestell's, we will give his remarkable testimony in full, in so far as it relates to Buena Vista Slough between those points. He testifies on his direct examination:

" Q—Did you ever farm on that country, or do you
" know generally that body of swamp land between
" Wible's headquarters and Tulare Lake; do you know
" that body of swamp land?
" A—I do. I attempted to farm down there. I sowed
" some grain in the spring of '78, east line of canal which
" runs from just above Wible's headquarters to the north
669 " It was on Section 2—a portion of it. The other sec-
" tions I dou't remember. I can show you the point on
" this map. The line of the canal is constructed there.
" That portion of sections 2 and 11 [Referring to map].
" It was on the southwest quarter of 2.
" [The witness is shown Map " D," and is asked if he
" ever saw it before].
" Q—Did you ever see that map before, Mr. Souther?
" [Map D, shown to the witness].
" A—I saw this map, or one just like it. I could not
670 " swear that is the map. We had one down there. Mr.
" Livermore used to carry a map just like that. He and
" I would go up and down with the map. It was made
" by Mr. McCray. I take this to be either that map or a
" copy of it. I used a copy of that map in connection
" with my work down there; one just like it, at least. It
" might have been this, but I think not. I think Mr.
" Livermore kept this, or one like it. Wible had one,
" Livermore had one, and I had one.
" Q—Can you now designate on that map what por-
" tion of those lands you cultivated or sowed?
" A—It was in the south half; you may say, a portion
" of the south half of Section 2. It runs a little over

671 " the southwest quarter. Possibly I might have run
" over that line. I don't remember now exactly. Sec-
" tions 11 and 2. I said the southwest quarter of Sec-
" tion 2. I might have run over the corner into the
" southeast quarter here. I think not, however. There
" was some water in there that troubled us. I think
" it was all east of that line, of the central line.
" I sowed grain on that portion of Section 11, east
" of the canal, on Section 11. It would be a portion
672 " of the east half. I sowed these lands I speak of in
" grain. Then I went down on Secs. 3 and 33, if I re-
" member rightly, ran through all these sections and ex-
" amined the lines and corners as marked by Mr. McCray.
" I think in Sec. 3 I ran down; left Sec. 2 and ran out.
" My roadway is there yet. I think it runs, leaving the
" canal at Sec. 2, where the east line of the canal runs
" through. I ran through Sec. 3 and off to the line strik-
" ing the canal about a mile below the corner of Sec. 33
" and 34, the township line as well as the section line.
" I followed that section line then to my camp, which
" was on Buena Vista Slough, at the end of the cut
673 " which is marked Central Cut.
" Q—What was the cut? Is that cut there in your
" land?
" A—*The design of that cut was to convey the*
" *waters across the flat. In the slough there was a*
" *break; a place wide and flat. There was no*
" *slough to amount to anything.* I designed running
" this water to my canal, which I did. I made a road-
" way, and on either side of that roadway I had a canal
" to conduct the water down along these lands, to throw
" it on the lands or off the lands.
" Q—*Could the water run through the slough at that*
" *point?*
674 " A—*Well, it spread. The water, when it got to this*
" *point, the water spread all over the country.*
" Q—*What point is that?*
" A—*This upper point of this cut marked "Central*
" *Cut," that terminated on the line between Sec.* 3 *and* 4,
" and ran down to the northeast corner of Sec. 5. *When*
" *the water flowed down the slough here—this crooked*
" *slough here, as you see marked on the map—and got to*
" *that point, that is, the southeast point of the central*
" *cut, as marked on Map D, it spread to the south.* The
" water came from off here, a large portion of it. Some
" of it went along down there through this land, appar-
" ently right in here. (Pointing on Map D). It was

675 " right in the flat slough or channel there, as marked.
" Though that slough or channel had banks principally on
" the north side, if I remember right, there was very
" little bank, if any. In places there was a small bank
" on the south. But generally it flattened out to the south,
" and that being lower caused the water to run off here
" and flow down that south line. *The water would over-*
" *flow to the south at that point.* I plowed some in Secs.
" 33 and 32, in T. 29, R. 24. I put in some corn and
676 " pumpkins there on these sections. I did not put in a
" crop at any other place down there. I have left there.
" The water drove me out. I went outside and purchased
" a little house from Mr. De Webber. That is on Sec. 20,
" in the same township.
" Q—You say the water drove you out. Didn't you
" raise a crop there?
" A—No, sir; the water flooded the crop. Before I left
" it, or about the time I left it, the water was coming
" over the land, over the corn, etc., that I had planted.
" Q—Was the water that was coming over there, flow-
" ing in any channel at all?
677 " A—Well, it came in on me from the east. The water
" apparently had been turned ont here. When I com-
" menced my roadway the water was flowing all through
" this country here. (Referring to Map D.) It spread
" over that portion of this country. When I threw in my
" levee here there was a low place up here, a low place in
" the ground. I didn't get the levee high enough, and
" the water ran over it. That came behind here and all
" through that entire country. So much so that it drove
" me out. I had to leave; to go out to dry land. The
" slough was filling up.
678 " Q—What do you mean by the slough, Mr. Souther?
" A—I mean that tract of swamp and overflowed land.
" Q—In the use of the word "slough," you mean, gen-
" erally, that tract of swamp and overflowed land?
" A—We generally call that the slough lands. The
" Buena Vista Slough lands is the common term we use to
" describe these lands.
" Q—You are not, in the use of that word, referring to
" any particular channel, are you?
" A—No, there was no particular channel, or rather, the
" water came down the channel until it reached a point
" just below the head-gate, perhaps about half a mile.
" There are some depressions there. We termed them
679 " sloughs that ran from the canal on the east side back to
" the east line of the canal here. Those where what we

" termed the slough. It was a depression in the land
" that ran back there. The water, when it got back
" there, flowed out into the channel. That bank is lower
" than it was here—back in the main described chan-
" nel here. It went off here instead of following
" that down, and that is the water that troubled me.
" *When the water was turned through that head-gate, a*
" *few rods above the camp; into this slough; into Buena*
680 " *Vista Slough, it ran down in here somewhere.* I NEVER
" WAS THERE FROM THE FACT THAT THERE
" WAS SO MUCH WATER THERE. I COULD NOT
" GET BY IT. I went down to the west side to the west
" bank. It was not all the way down. But the bank was
" low there, and it threw it out here. The water came in
" here to the bank of the canal. I threw the water right
" up against the east bank of the canal. It flowed down
" in here through that break in the slough there where Mc-
" Cray left the break in the slough; the depression there
681 " was low to the east. That is in Section 15, Section 14.
" It must be 15, in Township 30, Range 24. The water
" that came up here to the east, flowed back in this de-
" pression until it struck the east line of canal in Section
" 11. Then it flowed down all over that country there,
" from there clear to the slough. There was so much
" water that I tried several times to get through there,
" and usually failed to get through. Once or twice I
" made it through there. The whole country was inundated
" there; all through that portion there down to 3, and
" into Section 3. There was a line of smaller and greater
" high Weed Island, as they were termed. There was no
" tule on them, and the water had to get pretty high be-
682 " fore it got there. That dry land I intended to follow,
" and did follow that with my levee, my roadway. I had
" run that, as I said before, from where I went to Sec.
" 3 until I reached—
" Q—[Int.] Never mind the road. It is the water I
" am speaking about.
" A—I threw my roadway up. There was water lying
" on both sides of the roadway. I used it as a canal and
" a roadway both. The water followed that roadway and
" flowed over it. The water was lower next to the east
" side of canal than it was when you got down to the
" higher elevations where the weeds grew. In that part
" of the country where the water does not flow generally
" over the land there are no tules, but grass and weeds—
683 " on these little weed islands. I tried to follow them.
" That is the reason I ran the road crooked. Following

" those around, I came to the north line of Section 4, T.
" 30, R. 24; then I followed that section line or township
" line to the slough until I stopped at the camp. The
" water came out and overflowed the country between
" what is marked as the slough on this map and the east
" line of canal. It spread out pretty much all over the
" country; so much so that it drove me out of Sec. 33,
" where I was doing the work. I plowed considerably
684 " on 33. On 32 and 33 was my first work, and some on
302 " Section 4. This is Section 4. (Referring to the map.)
" On Section 4 and 32 and 33 was my first work inside of
" what we termed the slough lands. It drove me out of
" there and spread over that whole place. The water
" came down within a few rods of my camp, and I left.
" I think that was in April, 1878. After I moved to the
" De Weber house, I did some work on Section 32. The
" most of my work was on Sec. 30, in T. 29 S., R. 24. I
" plowed and ditched and leveed; threw up a levee be-
" tween Secs. 29 and 30, for the purpose of, finally, if I
685 " succeeded in my enterprise, planting so much of my
303 " ranch near to my fence, along that line. I went to work
" and threw a levee there; a light levee. It didn't take
" much of a levee to force the water back. I made a
" ditch. The levee, of course, made a ditch on
" both sides. I did not succeed in my farming down
" there. The water finally got all over the country
" so that I could not easily get in, and I became a little
" disgusted with the country down there and left it.
" That was in 1878. I think I left there in May. There
" was plenty of water down there then. *At that time*
" *Bonestell was living down there.*
686 " Q—*Did he have any water down there?*
304 " A—*Well, he had some water. There was a little wa-*
" *ter in the slough. A little had run down in the slough*
" *at the first rise.* It was either in January or February.
" I disremember the exact time that the water come
" down. It was about that time, though. I was there
" off and on all through February and sometimes in Jan-
" uary. It was about that time. At the time I was be-
" ing flooded out at my place, the water had not reached
" Bonestell yet. One cause of the flooding was that
687 " Bonestell went up to Wible—I had spoken to Mr.
" Wible not to turn in any water, if he could get around
305 " it. Mr. Bonestell came and asked him if he would
" not turn him in some more water, he was short; his
" crops were failing. He turned the water on, and that
" increased the water on me, and it spread out.

" Q—The water had spread out over the country before
" it got down to Bonestell's.
" A—*A pretty large proportion of the water ran to the*
" *east line of canal and went down that portion of the*
" *slough.* WHEN IT GOT TO THE UPPER END OF
" THIS CENTRAL CUT, AS MARKED ON THIS
" MAP, THERE IT RAN THEN OFF TO THE SIDE.
" It took a large body of water in order to get it
688 " down the slough enough so that Bonestell could irri-
" gate with it. Hence, when they turned it in on Mr.
" Bonestell to supply him, it flooded me out."

T., III, fol. 668–688.

This is the only witness of the twenty-two witnesses who testified to the condition of Buena Vista Slough from Wible's Headquarters to Bonestell's, who in any manner refers to a break in Buena Vista Slough at any point south of the head of Weed Island. His testimony in relation to this break is:

" When the water was turned through that head-gate,
" a few rods above the camp into this slough, into Buena
680 " Vista Slough, it ran down in here, somewhere. I
" never was there from the fact that there was so much
" water there. I could not get by it. I went down to
" the west side of the west bank. It was not all the way
" down. But the bank was low there, and it threw it out
" here. The water came in here to the bank of the canal.
" I threw the water right up against the east bank of the
" canal. It flowed down in here through that break in
" the slough there where McCray left the break in the
" slough; the depression there was low to the east. That
" is in Section 15, Section 14. It must be 15, in Town-
681 " ship 30, Range 24. The water that came up here to
" the east, flowed back in this depression until it struck
" the east line of canal in Section 11. Then it flowed
" down all over that country there, from there clear to
" the slough. There was so much water that I tried
" several times to get through there, and usually failed to
" get through. Once or twice I made it through there.
" The whole country was inundated there; all through
" that portion there down to 3, and into Section 3."

T., III, 680–1.

But it will be noticed that he had before testified as to where this water first spread from the slough.

" Q—Could the water run through the slough at that
" point?
674 " A—Well, it spread. The water, when it got to this
" point, the water spread all over the country.
" Q—What point is that?
" A—This upper point of this cut marked "Central
" cut," that terminated on the line between Sec. 3 and 4,
" and ran down to the northeast corner of Sec. 5. *When*
" *the water flowed down this slough here—this crooked*
" *slough here, as you see marked on the map—and got to*
" *that point, that is, the southeast point of the central*
" *cut, as marked on Map D, it spread to the south. The*
" *water came from off here, a large portion of it.* Some
" of it went along down there through this land, appar-
675 " ently right in here. (Pointing on Map D.) *It was*
" *right in the flat slough or channel there, as marked.*
" Though that slough or channel had banks principally on
" the north side, if I remember right, there was very
" little bank, if any. In places there was a small bank
" on the south. But generally it flattened out to the south,
" and that being lower caused the water to run off here
" and flow down that south line. The water would over-
" flow to the south ~~of~~ at that point."
" T., III, fol. 673-5.

And, again, he says:

" "A pretty large proportion of the water ran to the
" east line of canal, and went down that portion of the
" slough, *when it got to the upper end of this Central*
" *Cut, as marked on this map there, then it ran off to*
" *the side.*

T., III, fol. 687.

Mr. Wible, who lived on Section 15, T. 30 S., R. 24 E., near where it is claimed this bank exists, and where it is claimed that Mr. Souther testified that the water flowed from the slough, clears up this matter under questions put to him by defendants' counsel, on cross-examination.

Mr. Souther says Wible turned so much water down Buena Vista Slough that it flooded him out.

Mr. Wible says:

" Q—Wasn't it a fact that he (referring to Souther),
" quit there because he was drowned out with the
" water.
" A—No, sir; he was not; he was not driven away by
" too much water, not on Sec. 11; he was driven away
" by too much water from Sec. 32; that was in 1878; he
" did not have any crop in; I saw some corn growing,
" and that was all. That was the only place that he was
" driven out by water. *I had a break in the canal, and*
" *turned the water into the slough, and it overflowed at*
" *that point; that is just below. The water came out*
" *here where the drift was at the head of Weed Island,*
" *and ran down on the east side of that channel and over-*
" *flowed a portion of Sec.* 32.

J. II fol 2071-2.

Incidentally, we will here mention that Mr. Souther tries to have it appear, by his testimony, that this "Central Cut," marked on Map D, was actually made on the land, but Mr. Fillebrown says it was not (T., IV, fol. 247-50 and 325).

But take his whole testimony, it shows conclusively that when he referred to the break left by McCray in the slough, he was referring to the point at the south end or head of the line on Map "D;" called "Central Cut," and not to a break on Section 15, or to the very point where all the witnesses locate the drift pile which they say caused the water to flow out of the channel both to the east and west.

It clearly appears that Mr. Souther never did get up to Section 14 or 15 to see what the condition of the slough was at that point. He says: "I NEVER WAS "THERE, FROM THE FACT THERE WAS SO "MUCH WATER I COULD NOT GET ON IT." (T., III, fol. 680.)

Without Map D. Mr. Souther's testimony would not be seriously considered for a moment, as establishing a break at Buena Vista Slough, at a point where numerous other witnesses testified the channel is well defined. With the map in aid of his testimony this Court

is not going to give enough weight to it, so that it will be considered as creating a "substantial conflict" of testimony as against all the evidence of plaintiffs' and defendants' witnesses who testified to the condition of Buena Vista Slough, between Wible's Headquarters and Bonestell's and with no less than four maps in evidence made by employees of both plaintiffs and defendant, one by employees of persons not parties to this suit, all showing a well defined slough at this point where a break occurs on the map annexed to and made a part of the findings.

Respondent claims that this finding is sustained by the evidence of J. C. Crocker; that Crocker testifies that there was a break in the slough on Sections 14 and 15.

And here we have again a sample of the manner in which this Court is *aided* by counsel for respondent pointing out such evidence as "is sufficient merely to support the finding thereon."

We repeat all contained in respondent's brief in reference to this alleged testimony given by Mr. Crocker, and then follow it with the testimony actually given by Mr. Crocker, taken from the transcript.

On pages 213 and 214 of respondents' brief, they say:

"Crocker's testimony also proves, like that of "Souther, that the water coming down the slough, "when it reaches those breaks shown by McCray in "Sections 14 and 15, there passes to the east instead "of following the channel. He is asked:

"Q—How many channels are there besides this "one you speak of, from Wible's down to Weed "Island.

"A—I don't know of any *regular* channels. There "is places where there is depressions—no *regular* "slough. * * On the east side of that slough, from

"Wible Camp down, between that and the main "land, there are depressions in the ground, like "sloughs cut out.

"Q—Wherein does not that, when the water is all "gone, present just the same characteristics of a "watercourse as the one you call the main slough?

"A—There where the water breaks out the water that "runs down there generally comes in and stands be-"tween the levee and what we term the head of Weed "Island on the east. It stands in that country. (T., "II, fols. 597 to 600)."

"The break mentioned by Crocker, in this last an-"swer is not the break he had previously referred to "as 'three miles below Wible's,' for, at that break he "says the water goes to the west, whilst from this "break the water passes to the east, where 'there are "'depressions in the ground like sloughs cut out." "As the water passes to the east, according to Crock-"er's description, just the same as it does according "to Souther's description, the break last referred to "by Crocker must be the same as that mentioned by "Souther and shown on Map D by McCray:"

Mr. Crocker's testimony from the Transcript, on cross-examination:

"Q—*How many distinct channels are there from Wible's "down to Tulare Lake?*

"A—*There are two that I consider promineut water "channels that go through.*

"Q—*Are there two continuous water channels running "all of the way from Wible's down to Tulare Lake through "that swamp?*

"A—*No, sir. There is one running down to Weed "Island—only one channel until you get to the head of "Weed Island.*

597 "Q—From Wible's to the head of Weed Island there "is only one channel or watercourse through the whole "swamp, the whole width of it?

"A—At a low stage of water.

"Q—At a high stage of water, how is it?

" A—It will spread out and go through other sloughs.
" Q—*How many channels are there besides this one you*
" *speak of from Wible's down to Weed Island?*
" A—*I don't know of any regular channel. There is*
" *places where there is depressions—no regular slough.*
" Q—Why isn't it as much a regular channel as the
598 " channel from the place where the permanent banks
" cease down to Weed Island?
" A—Well, I mean water goes down through the
" slough, it being the larger slough.
" Q—Are there not other channels from Wible's to the
" head of Weed Island, just as distinct when there is
" any water there; that gave as much the appearance of
" a watercourse, when dry, as the one of which you have
" spoken?
599 " A—I think not. I think they differ—not having a
" current.
" Q—I am speaking of the appearance they present
" when the water is all off and they are absolutely dry?
" A—On the east side of that slough, from Wible's
" Camp down between that and the mainland, there are
" depressions in the ground, like sloughs, cut out.
" Q—Wherein does not that, when the water is all
" gone, present just the same characteristics of a water-
" course as the one you call the main slough?
" A—There where the water breaks out, the water
" that runs down there generally comes in and stands
" between the levee and what we term the head of Weed
600 " Island, on the east. It stands in that country. I have
" never seen it with a current there, as there is through
" the head of Weed Island. *In going from Wible's down*
" *to Weed Island, when the water is taken off there, and*
" *the country is perfectly dry, I only found one channel*
" *from Wible's down to Weed Island. That is, to where*
" *it widens out. That, I guess, is about three miles.*"

T., II, fol. 596—600.

On his direct examination, this witness testified:

" Q—Mr. Crocker, have you ever been through and
" along Buena Vista Slough when there was no water
" running in the channels at all?
" A—Yes, sir.
" Q—What was the condition of the channel of Buena
" Vista Slough from where it leaves Buena Vista Lake?
" A—Well, I should have to describe it by sec-
" tions.

" Q—Describe it by sections.

516 " A—Buena Vista Slough, from where it leaves Buena " Vista Lake north, to within half a mile of where New " River runs into Buena Vista Slough, or where it did " when I was last there, is a very deep slough, the same " as it was when I first saw it; a very deep slough, but " not so much water in it. When you get within about " half a mile of the mouth of New River, where it enters " the slough, it is different there for a distance of two or " three miles from what it was when I first knew it. It " is filled up with sediment and sand; grown up with " willows. When we first saw it there was no timber on " it. When you get still north of that point, the slough " becomes more as it was in former years, wide and deep.

517 " Q—*How far does that continue?*

" A—*It continues (referring to Map 2), I should think " from the general lay of the country: not from any actual " survey—I should think there was a deep slough there " for about eight or nine miles below where New River " enters Buena Vista Slough, then it branches. That is " the point where it reaches Weed Island and branches.*"

T., II, fol. 515–17.

Counsel refer to the testimony of Mr. Macmurdo as supporting Map "A," in showing a break in the slough on Section 15, and here again referred this Court to the evidence in support of this finding, and claims that it justifies the finding that the breaks in Buena Vista Slough, appearing on Exhibit "A," actually exist.

And here we have another sample of counsel's statement of testimony that the Transcript does not support.

The following is the testimony of Macmurdo, as it appears in the Transcript (Vol. IV, fol. 1067 to 1070):

" Q—*After crossing the levee and going northward, " will you describe this slough?*

" A—This slough continues on pretty much the same " character of slough. It is very crooked, gouged out in " deep holes on the bottom; has perpendicular banks in " places; *continues on in that wag probably a mile to " the northwest; it continues that way to Section* 15, UN-

" TIL IT REACHES THE NORTH LINE OF SEC-
" TION 15.

1068 " Q—Continues how?

" A—Continues to run very crooked, and it has very
" deep holes along there, and it has well defined banks
" until it reaches very nearly the north line of Section
" 15, T. 30, R. 24. There are ponds on the outside of
" the channel, and the water of the slough goes up in
" this pond there and into Section 15, between the chan-
" nel and the bank of the canal.

" Q—You say that it has defined banks. How are the
" banks as to height above the bed of the slough?

" A—It is hard to tell where the bed of the slough is
" there. There are deep holes in it. In some places
" they are 10 feet, I suppose, above the bottom of the
" slough.

1069 " Q—These deep holes?

" A—That is, the deep holes. The water:—*take an*
" *ordinary small head of water, and run it through there*
" *and it will be probably 4 feet above the surface of the*
" *water.*

" Q—*That is, the lowest bank in there would hold 4*
" *feet of water in Section 15.*

" A—*I don't know. There are probably lower places*
" *than that.*

" Q—*There are places where 4 feet of water would not*
" *be contained in the banks?*

1070 " A—*I think so.*

" Q—*From the north line of Section 15, describe the*
" *slough through the next section, that is, Section 10, T.*
" *30, R. 24.*

" A—*The slough, a part of the way, has good banks in*
" *there, and it is very crooked, and the current is very*
" *sluggish, very slow.*"

underscored in red.

The portion ~~in italics~~ is left out of the brief of respondent, although what is inserted is in quotation marks.

But why take the general testimony of Macmurdo, when testifying as to the condition of the slough from Wible's Headquarters to Bonestell's, to ascertain the condition of the slough at the point where the break is said to be, just south of the north line of Section 15, when we have his testimony as to its exact condition, width, depth, and depth of water, at this very point?

He and Mr. Crusoe crossed this slough at this very point on the trip down the slough on the 15th day of May, 1881, crossing it on a wire and board fence, and each of them gives its size at this very point.

Macmurdo says:

" I went back again to this slough, north of Wible's " camp. The next morning, I think it was May 15th, we " went down to the point where the levee of the Kern " Valley Water Co. crossed the slough; *and from there* " *we followed up the bank of the slough, the right bank,* " *the east side of the slough; we went up to Crocker's* " *place.*

" Q—*Whereabouts is that?*

" A—*It is on Section* 10—*I believe it is on* 10; *or a* " *part on Sec.* 15 *and a part on Sec.* 10.

1154 " Q—*The east bank of the slough near Crocker's house;* " *how did you find the slough? what did you see?*

" A—*We found a slough there; a pretty good slough* " *from the levee up to Crocker's place.*

" Q—Did you see any water there?

" A—Yes, sir; there were some ponds out there on the " west side, between the slough and the bank, and then " just before we reached Crocker's place, on the east side " of the slough, there was some water running out of the " slough into the pond on the east side of the slough. " *That is where Mr. Norton is living now. The Crocker* " *place and the Norton place are the same.*

1155 " Q—*Then, going along the east bank of the slough as* " *far as the Crocker place or the Norton place, what did* " *you do?*

" A—*I crossed over to the west side, and followed the* " *west side of the slough, then up to the north end of* " *Weed Island.*"

T., IV, fol. 1153–5.

This is on his direct examination. Of course he fails to give the size of the slough, as this is never asked of any witness by defendant's attorneys on their direct examination.

But on cross-examination, plaintiffs desired to know the size of this slough between Headquarters and the point where it first touched plaintiffs' land, and so we went fully into the matter with this witness, and he testified:

" I was down there again with Mr. Crusoe the following
1275 " day. We went down where the levee crossed the
" slough near the Headquarters camp.
" Q—*Did you go down into the line of the slough?*
" A—*Yes, sir; on the east side. We followed along*
" *on the east side until we reached the Headquarter*
" *place—that is, the Norton place—and we crossed there*
" *and went across on a wire stretched across the slough.*
" Q—*How deep was the water at that point?*
" A—*The water was—I don't remember exactly. They*
" *measured it. I did not measure it myself and don't*
" *remember. It was about five or six feet deep.*
" Q—*How wide was it at that point?*
1276 " *A—I did not measure it; probably* 50 *feet.*
" Q—*How wide was that slough where you crossed it*
" *at Bonestell's?*
" A—*I cannot say; probably not over* 30 *or* 40 *feet;*
" *may be wider at that point.* In that place it is, where
" they had been crossing, and the water had hollowed
" out the banks some little distance. I don't think it
" was over 40 feet."

T., IV, fol. 1274–6.

Why do not counsel for defendant give the testimony of Mr. Crusoe, as to the condition of Buena Vista Slough at this point? He was with Mr. Macmurdo on this trip, and Mr. Crusoe testified very fully as to the condition of this slough at this point on Section 15, where the break appears on Exhibit "A," annexed to the findings.

He testified, on direct-examination:

" The next day we went back
" to the swamp again; this was last Saturday, the 14th
" day of May. The next day was Sunday and we went
" back to the swamp; we went down the levee of the Kern
" Valley Water Company until we passed the East Side
" Canal. *We got out of the wagon and walked down in*
" *the general direction of the slough about opposite*
210 " *Crocker's house. We found water in some ponds stand-*
" *ing before we reached Crocker's house; I don't know*
" *that I can tell what section Crocker's house is on; it is*
" *somewhere here on Section* 10, *Township* 30, *Range* 24;
" *about that; the water was confined to the banks there;*
" *we crossed the slough near Crocker's barn; we went to*

" *the well and got a drink of water, and then got over the*
" *fence into the barley and alfalfa field, and we followed*
" *along the general direction of the slough, I suppose,*
" *nearly a mile.*"

T., IV, 209–10.

We are again left to find out, on cross-examination, the size of this channel at Norton's or Crocker's house, where this break is said to be, and we do it.

CRUSOE testified, on cross-examination:

" Q—*The second day that you were down there, when*
" *you drove along that levee—you went down the east*
" *side, as I understand you, on the slough?*
" A—*Yes, sir; until I came to a point right opposite*
" *Crocker's house, and I crossed the slough at that point.*
" Q—*How deep did you find the water?*
" A—*I did not wade it there; we crossed on a wire*
" *stretched across with some old panels on it.*
" Q—*How wide was it at that point where the panels*
" *were?*
230 " A—*I think it was fifty or sixty feet wide.*
" Q—*Did you measure the depth of the water there?*
" A—*We ran a stick into it.*
" Q—*How deep was it?*
" A—*About six feet, I think.*
" Q—*Was there a current at that point?*
" A—*Yes, sir; a sluggish current.*
" Q—*How was it at the place above Crocker's?*
" A—*About the same; probably more of a current at*
" *Crocker's than below.* We went along the fields below
" Crocker's about a mile to the north, and there struck
231 " the slough and came on the levee; *the levee followed*
" the general course of the slough."

T., IV, fol. 229–31.

Mr. FILLEBROWN also testifies as to the size of the channel at Crocker or Norton house, and also of its dimensions from Wible's Headquarters to Norton's. He says:

" I did not measure the water
" along there, at any point between that point at the
" Norton house and the slough. *It is difficult to state*
" *the average width of the slough from the weir down to*

325 " *Norton's or Crocker's, it is so variable. It varies*
" *all of the way from 35 to 60 or 65 feet, perhaps. It is*
" *very irregular in its width.*"

T., IV, fol. 323-4.

And coming to the channel at the Crocker house, where this break appears on Sec. 15, the witness says:

" Q—Opposite counsel seem to make it appear that
" every time you refer to a slough there, you refer to the
" whole body of swamp land. I want to know if, when
" you said that on Sunday you went down along the west
" side of the levee, and came to the slough, and followed
371 " that slough, or along on that slough until you came to
" the Willows, what did you mean by slough?
" A—When I said "slough," I meant the slough; that
" is, that all along through there, THE SLOUGH HAS
" A CHANNEL WHICH IS WELL DEFINED
" ALONG THERE BY THE CROCKER PLACE;
" and I followed close to the banks of that channel in
" places."

T., IV, fols. 370-71.

Although a little out of its order, we will here give the testimony of Milton Norton, who lived at the Crocker or Norton house, on the south line of Section 15, right at the point where this break is said to be, and within 50 feet of the slough. (T., II, fol. 1675.)

He testifies:

1669 " [To Mr. HOUGHTON.] I reside on Buena Vista Slough,
" about a mile and a quarter below Headquarter Camp,
" below the Wible Camp; it is on Section 15, Range 30
" South, 24 east. I have resided there for two years last
" fall: I am engaged in running hogs there, and in farm-
" ing, some; I am cultivating land there—a part of Sec-
" tion 10, in the same township; I think it is the south-
" west quarter.

T., II, fol. 1669.

* * * * * *

" I went back in
" August in 1878; I then located where I am now living.
" My business since August, 1878, has been raising hogs
" and farming some.
1673 " Q—Where have you been running those hogs—be-
" tween what points on the slough?

" A—Well, they run from Wible's down to the lower
" end of Weed Island; the lower end of Weed Island is
" not very far; probably three-quarters of a mile below
" Bonestell's.
" Q—Do you know what was the condition of Buena
" Vista Slough between the place where it leaves Buena
" Vista Lake and the place where you have been running
" your hogs—three-quarters of a mile or a mile below
" Bonestell's—when you first saw it?
1674 " A—When I first crossed it, the first time, it was dry,
" except in holes.
" Q—Well, what was the dimensions? What was the
" average width of that slough between those points,
" when you first saw it?
" A—I think it would average about 123 feet wide, and
" will average between 12 and 15 feet deep.
" Q—What kind of banks has it during that distance?
" A—Well, the banks for the most of the distance are
" steep, and only at places you can cross.
" Q—How did you cross that slough between Bonestell's
" house and Tracy's Crossing, when you desired to cross
" it, when it was full of water?
1675 " A—When it is full of water we generally have to
" swim it.
" Q—Well, is it an easy stream to cross, or difficult?
" A—No, sir; it is a very difficult stream to cross.
" Q—*How near does that slough run to your house?*
" A—*It runs within* 50 *feet of the house.*
" Q—It has been running there ever since you have
" been running at that point?
" A—Well, the water has not always been running.
" Q—The slough is there; there is no change in the bed
" of the slough at that point?
" A—No, sir.
1676 " Q—*Does the slough run through the land that you are*
" *on there—the west half of Section* 10?
" A—*Yes, sir. I don't know as I can describe where it*
" *runs through Section* 10*; it crosses the southwest quar-*
" *ter, and crosses the line. We built a fence on the line;*
" *it runs north and south,* and we had to cross the slough
" several times; the slough also crosses the northwest
" quarter of Section 10.
" Q—Have you ever seen that slough between Buena
" Vista Lake and the Bonestell House when it was all
1677 " dry?
" A—I have seen it when it was, except in the water
" holes; water holes don't dry up.

" Q—At such times, how deep would it be down to the
" bed of the slough, or to the water, from the bank?
" A—*Well, it would be about, I think, six feet.*
" Q—What depth of water would you have to put in
" that slough between those points, before it would over-
" flow its banks?
" A—I could not tell exactly; I would think—Do you
" mean when the slough is dry?
" A—I mean how much water would you have to run
" above the bed of the slough, when it is dry, before the
" slough would overflow its banks?
1678 " A—I could not tell exactly; I think about six feet,
" though.

T., II, fols. 1672–8.

Mr. Epperly says of this channel at the Norton House:

2192 " I have crossed it there a number of times since. I
" could not say the number. I have not crossed there
" recently. I have not crossed that channel at any other
" point above the Bonestell House, except that until you
" get up above the head of Weed Island, but I have
" crossed it there.
" Q—What kind of a crossing was there there?
" A—Well, you cannot cross there in a high stage of
" water, but in a low stage you can cross there. It is
" very boggy, and bad crossing. *I have crossed up*
" *where Mr. Norton's place is, Mr. Norton's Ranch. I*
2193 " *don't know what section that is in. When the water is*
" *low there is pretty good crossing, but when the slough*
" *is anything like full a man cannot cross it without*
" *swimming.*"

T., II, fol. 2192–3.

Tracy says there was no crossing between below his, Tracy's, Crossing, and Weed Island, prior to 1877.

T., II, fol. 951–2.

That there was an open channel to and through Weed Island.

T., II, fol. 954.

The testimony of Mr. Fillebrown, in the brief of respondents, is correct so far as given, but had counsel

commenced about one folio earlier this Court would have been informed that Mr. *Fillebrown followed the main slough from Wible's Camp "right close to the banks "of the slough to a point opposite Mr. Crocker's house, "and a little below, some two or three hundred yards.* "(T., IV, fols. 242–3)."

Then this witness fixes definitely the location of the Crocker or Norton house. He says it "is on Section "15, T. 30, R. 24, very near the north line of the "northwest quarter," (f. 243), or at the very point where the break appears on Exhibit "A," annexed to the findings, showing conclusively that Macmurdo and Crusoe crossed the slough at the very point where this break is said to exist.

If there is anything in the testimony of Mr. Fillebrown to justify a finding that Buena Vista Slough is not continuous from Wible's Headquarters to Bonestell's, we fail to find it. He says there was water in the slough running past Crocker's, but that some 200 or 300 yards below it *overflowed the banks of the slough.*

On cross-examination, we also got from this witness a better idea as to the size of the slough from Wible's down.

He says:

"When I was down
"on Buena Vista Slough last Saturday, I followed along
"on the north side of the main levee of the Kern Val-
"ley Water Co. to a point where the water runs through
"a weir and into the slough, and then followed that
"slough down. I followed it there along the slough, or
323 "along the overflowed ground down to the Willows on
"Weed Island, but not on the slough all of the way.
"I was on the east side of it all of the time; did not
"cross it at all. The slough was 40 or 50 feet wide where
"it was taking water from the weir, I guess. I don't
"know how deep the water was right there at the gate.
"I did not measure it. *I did not measure the water*
"*along there, at any point between that point at the*

"*Norton house and the slough. It is difficult to state*
"*the average width of the slough from the weir down to*
324 "*Norton's or Crocker's, it is so variable. It varies*
"*all of the way from* 35 *to* 60 *or* 65 *feet, perhaps. It is*
"*very irregular in its width.* In following down there
"I did not keep on the slough all the way.
" Q—Did you measure the depth at any point on the
"slough down there on Sunday?
" A—No, sir; I did not.
" Q—Did you measure the depth of the slough at any
"point?
" A—No, sir; *I followed the slough down to the Wil-*
"*lows. I cannot locate the Willows positively. I think*
"*they are located at that sharp bend in the slough on*
325 "*the southeast corner of Section* 32*; but I am not per-*
"*fectly sure as to that.*"

T., IV, fol. 322–5.

And coming to the very point where defendant claims the break in the slough exists at Sec. 15, the witness says:

" Q—Opposite counsel seem to make it appear that
"every time you refer to a slough there you refer to the
"whole body of swamp land. I want to know if when
"you said that on Sunday you went down along the
"west side of the levee and came to the slough and fol-
371 "lowed that slough, or along on that slough until you
"came to the Willows; what do you mean by slough?
" A—*When I said "slough" I meant the slough; that*
"*is, that all along through there;* THE SLOUGH HAS A
"CHANNEL WHICH IS WELL DEFINED ALONG
"THERE BY THE CROCKER PLACE; AND I
"FOLLOWED CLOSE TO THE BANKS OF THAT
"CHANNEL IN PLACES."

T., IV, fol. 370–1.

Outside of the testimony of these numerous witnesses, we have two maps ("H" and "I"), made by Macmurdo and James, from meander surveys of this very channel, and Macmurdo says the object in making that meander survey was "*To find out and to* "*lay down correctly on the maps any channel that might* '*be through that body of swamp land.*" (T., IV, fol. 1077.) And both James and Macmurdo testify time

and again, that Buena Vista Slough is correctly laid down on these maps, and from the meander surveys made in 1879.

At folio 1289 Macmurdo is asked:

" Q—What lines are laid down upon that Map "I,"
" by actual survey?
" A—Well, nearly all of these are laid down by actual
" survey. *That is, the slough, channel. the river and*
" *these canals.*
" Q—*What slough do you mean?*
" A—*Buena Vista Slough.*"

Then it will be remembered that Macmurdo testified that in making a meander survey of a water channel if he found a break of a few yards where the water was shallow and the banks were not well defined; in making a map from such survey he would not mark a water channel, although the channel commenced again after such space of a few yards. That he does, in fact, leave such breaks in Buena Vista Slough on Section 32, T. 30, R. 25, where he found a bank on the west side of the slough 150 feet high, but had to go a quarter of a mile to find a bank on the east side of the slough.

He says:

" Q—There appears to be in Buena Vista Slough
" certain breaks; what is the meaning of that on Map H,
" Section 32?
" A—It means where the channel is hard to determine,
" where the channel is. There are ponds all out there.
" Those ponds are represented on this map as well as
" they can be.
" Q—Is there any connection between those ponds,
" at all?
1252 " A—None that I know of, but the water; they are
" connected by the water when the water is there, but it
" is spread out and the banks are hard to determine,
" I don't mean to say they are not connected at all, by
" simply leaving these breaks in there.
" Q—Then that map is incorrect, as far as that water-
" course is concerned?

" A—So far as that part of it is concerned, that map
" is correct.
" Q—There is no connection between those ponds?
" A—This shows the connection.
" Q—If it don't appear there, how is the map correct?
1253 " A—The map is correct, because the water is shal-
" lower between those places than it is there [pointing].
" Q—*Then, in running a slough or watercourse, do*
" *you make a break in it when you come to shallow*
" *water?*
" A—*When the bank is not defined.*
" Q—*Although the stream continues a few yards*
" *beyond?*
" A—*Yes, sir.*
" Q—*If it ran over a piece of flat land for ten yards,*
" *would you make a break in it?*
" A—*If it ran over a piece of flat land and has no*
1254 " *banks, I don't make any banks there. I would not*
" *mark a watercourse where there is no bank and the*
" *water spread out.*"

T., IV, fol. 1251-4.

And he repeats it at folio 1232.

Testifying as to Map "H," he says:

" I made Map H. That was in April. I did not make
" that from notes, but copied it from another map, which
" was a map just like this. I did not make that other
" map. I don't know who did.
" Q—Do you know anything about the corrections of
" that other map?
1248 " A—Yes, sir.
" Q—How do you know that?
" A—Because I compared it with the other map.
" Q—How do you know about the correctness of the
" other map, if you didn't make it?
" A—*Because I surveyed all that country and I know it.*
" Q—Have you compared that Map H with your notes,
" checked it off?
" A—No, sir; I have not.
" Q—Then you simply know it is correct by looking
" at it?
1249 " A—No, sir. *I know it is correct by a copy of my notes.*
" Q—Have you checked that off by your notes?
" A—A portion of it I have checked off."

T., IV, fol. 1247-9.

James, referring to Map H, says:

253 " I don't know when map H was
" made. The surveys, from which it was made, were run
" in 1879. Mr. Macmurdo assisted me in that work. Mr.
" Macmurdo ran the meander line, and I ran the offset
" lines. We each of us had a party. Mr. Macmurdo ran
" the meander lines along all of the channels represented
" on Map H.
" Q—*Did he run the meander line along Buena Vista*
" *Slough, as represented on that map?*
" A—*Yes, sir.*
" Q—*The whole distance?*
" A—*The whole distance represented on that map.*"

T., III, fol. 253.

It is certainly a remarkable position for counsel for defendant to take, that the findings to the effect that Exhibit "A" is correct when it shows a break in Buena Vista Slough on Section 15, T. 30, R. 24, is sustained by the testimony of Macmurdo, when they put in evidence Map H, made by him from actual surveys, showing a clear cut channel of the slough *to the north line of Section* 15. And Map "I," not only showing the slough to the north line of Section 15, but taking it up at that point and continuing it for 8 or 10 miles, to Section 24, T. 29, R. 23, and without a single break, and that, too, when Mr. Macmurdo says had he found a place in the channel for the distance of 10 yards where the channel was shallow and had not well-defined banks, he should have made a break in the slough at that point, and not represented it as continuous on a map.

Then we have in evidence another map made for Messrs. Haggin & Carr, Map "4," that James testified: "I presume the map was made from some notes or " reference to some of my notes of surveys that I had " made." (T., III, fol. 257.) A map, he says, made for Haggin & Carr in connection with their applications for Desert Lands (fol. 257). It must, therefore, have

been made as early as 1877. (See Report of Davidson, dated Nov. 16, 1877, relating to the Desert Lands, T., II, fol. 1514.) This map, on fol. 256, is erroneously referred to as Map H, but by turning to folio 261, the error is corrected and the map properly referred to as Map 4. This map, made for Messrs. Haggin & Carr as early, we say, as 1877, shows a continuous water-course from Buena Vista Lake to Tulare Lake.

We have also maps made by McCray, Map "2," put in evidence by plaintiffs, and Maps "B" and "D," put in evidence by defendants, all showing Buena Vista Slough to Section 24, T. 29, R. 23, and precisely as located by Macmurdo and James on "H" and "I."

In a few words we can dispose of the so-called "break" in Section 14, T. 30, R. 24.

There is in this case no evidence of a break in Section 14, other than that made by the levee which is thrown across the east branch of Buena Vista Slough, where it crosses Section 14, except it be Map "D," which has "Headquarters" written through the slough just north of the levee.

We call attention to the testimony of Mr. Wible as to the condition of this slough where it is crossed by that levee. It appears that there were at that point two branches to the slough, one, the easterly, was close by the levee, the other, or westerly, had a gate placed in it. On Map "B" are shown the two branches, and how they unite a few hundred feet north of the levee.

Mr. Wible, who superintended the construction of this levee (T., II, fol. 1840). testified in relation to these channels:

1800 " Q—Where is the first gate or weir through which
" water runs from that canal?
" A—It is right in the bed of one of the channels of

"Buena Vista Slough, on Section 15. It is right close to
"the head of the canal. One corner of that gate is right
"in the old slough, Buena Vista Slough. Buena Vista
"Slough forks and runs around a little Island. One
"branch I closed up, and built the head-gate right near
"to that one.
"Q—Then, the water instead of running through two
"branches, runs through a head-gate that is built in one
"of them?
"A—Yes, sir.
1801 "Q—How does the bed of that gate compare with the
"bed of the slough before you disturbed it?
"A—Well, it is lower; lower than the bed of the
"slough was.

T., II, fol. 1800–1.

This west channel we do not find on Exhibit "A" at all, only the east channel, which Mr. Wible says was crossed by the levee.

The only witness of defendants who testified as to the channel of Buena Vista Slough where crossed by this levee, was Mr. Macmurdo, who on his cross-examination said:

"I have been down on Buena Vista Slough before
"the Wible levee was thrown across at Headquarters,
"near that point. But I never ran a survey or meander
"along that slough before that. I never made any sur-
1270 "veys of it before that. I never surveyed it. I know
"that it ran like it is laid down on this Map I, because
"that is the proper way for it to be there. I mean Map
""I." I don't know whether it ran in two branches at
"that point or one."

T., IV, fol. 1269–70.

Before leaving these findings relating to Buena Vista Slough as a watercourse, we wish to call attention to finding 18 again, and show that that finding is not only not sustained by the evidence, but contrary to the evidence of every witness of the defendant who testified in relation to that portion of Buena Vista Slough north and south of the Tule House. The finding is:

"

"

18.

"

"

"

Mr. TAYLOR tells us in his cross-examination what the object was in making this trip:

" Q—I understand that you were never across these
" swamp lands until you made this first trip?
" A—No, sir.
460 " Q—Did you go down there to prepare yourself to be
" a witness in this case?
" A—I went down there to see what the state of the
" country was.
" Q—*Did you go down there to prepare yourself to be*
" *a witness in this case?*
" A—*Yes, sir;* I went down there expecting to be a
" witness, and I wanted to see how the country appeared;
" I went down to see how the country actually was.
" Q—Whose employment are you in?
" A—Mr. Haggin's; I have been in his employment
" four years last February; the first time I went down there
461 " Mr. Jastro was with me.
" Q—Who else was with you?
" A—Mr. Cross and Mr. Barker."

T., III, fol. 459-61.

WALTER JAMES, civil engineer, says:

" A—At the Tule House there was a slough.
" Q—*What sort of a slough?*
" A—*Wide and deep, a well defined slough. I should say*
" 100 *feet wide and* 10 *to* 12 *feet deep.*
" Q—*Did you go along that slough?*
" A—*Yes, sir; we traveled down the slough in a north-*
" *erly direction.*
" Q—*Trace it on the map as well as you can?*
" A—*Through Section* 29, *and through* 20—
" Q—[Interrupting.] *On that same slough?*
190 " A—*Yes, sir; nineteen. My recollection is that the*
" *slough terminated on about Section* 20.
" Q—*You say it terminated about Section* 20. *How far*
" *from the Tule House was it that you followed it?*
" A—*A distance of a mile to a mile and a half.* I mean
" by terminated, it could not be traced any further. It
" goes out on the flat land. The slough disappears; from
" the termination of this slough we traveled westward.
" Points out the general direction and course on Map 4.]
" The COURT—Where is this Section 20 that you have
" just spoken of?
193 " A—In Township 25 South, Range 22 East. [Show-
" ing.] From this point a mile and a half more or less
" north of the Tule House I traveled——"

T., III, fol. 191-3.

It will be seen that this distance, one and a half miles from the Tule House, would bring this channel nearly, if not quite, to the margin of Tulare Lake. (See Ex. "A," annexed to the findings.)

Then as to the slough south of the Tule House and cross slough, he says:

" Q—Did you trace that slough any further north of
" the Tule House?
" A—No further north of the Tule House?
" Q—Now you have got back to the Tule House. What
" did you do next?
" A—*From the Tule House I followed up the slough that*
" *is there at the Tule House in a southwest direction, and*
200 " *on the east side of the slough, say a mile, more or less.*
" *The slough was well defined—easily traced at that point;*
" *and we traveled in the bed of the slough a mile and a*
" *half.*
" Q—That makes three miles. What did you find
" there?
" A—We found then we were near the western margin
" of the swamp and overflowed land, and we could see the
" high land from that point on the west side.
" Q—Now, from the Tule House, can you fix the point
" that you had gone to on the map, or trace the course of
" the slough that you followed up from the Tule House?
201 " A—It would be impossible to know exactly the route
" we traveled. The slough is crooked, winding about. We
" were going in a southwesterly direction, and the distance
" would bring us to about Section 21, Township 26 South,
" Range 21 East.
" Q—Do you mean the general direction that was laid
" down on this map, as the connecting channel between the
" east and west sloughs there, from 32 to Section 1?
" A—*I should judge that this map 3 represented the*
" *course, very nearly, of that particular part. My recol-*
" *lection is that it is more crooked than it is represented on*
202 " *the map.*
" Q—From the Tule House to a point in Section 1,
" Township 26 South, Range 21 East, were there any
" branches of that channel that you followed?
" A—*Soon after leaving the Tule House we could see*
" *the mouth of the slough coming in from the west.*
" Q—*Did you trace it up at all?*
" A—*No, sir; I did not trace it up at all.*"
"

T., III, fol. 199-202.

On cross-examination he says:

272 " *From the Tule House we traveled up the slough,*
" *which was there at the Tule House, a part of the time,*
" *alongside of it until we came to this cross slough.*
" *Then we went into that slough or some place in that vicin-*
" *ity and followed it through until it came to the channel on*
" *the other side.*
" Q—*You stated that after you had left the slough by*
" *the Tule House, a short distance, you came to another*
" *slough running in from the west?*
" A—*We could see the mouth of another slough com-*
" *ing in.*
273 " Q—*Is this correctly represented on there?*
" A—*I should say it was. That is about the way it*
" *looked to us as we passed along the other side. After*
" *reaching this west slough we traveled in a southerly*
" *direction, and kept along the slough some distance as*
" *far as the slough goes. I should say it was a mile, or*
" *a shorter distance than a mile—a short distance from*
" *where it comes out to the junction with this other chan-*
" *nel.*"

T., III, fol. 272–3.

C. G. Jackson says:

" Q—When you reached the Tule House, what did you
" find there?
" A—I found a body of water there immediately at the
" Tule House. *It was, I should judge,* 75 *or* 80 *feet, per-*
" *haps a hundred feet wide; in some places, narrowing*
" *down.*
" Q—*In the slough?*
" A—*Yes. sir. This was right at the Tule Hause, a*
" *little west of it.*
" Q—After reaching this slough at the Tule House,
471 " which way did you go?
" A—We followed that slough up about a half a mile
" northerly.
" Q—*Will you look at these maps, two and three, and*
" *point out the course, as near as you can?*
" A—*Well, if the Tule House is properly located, here*
" *it is on Section* 32. *I don't know what section it is on.*
" *If that is the proper location, we started right in here*
" *at Section* 32, *and went northerly about half a mile*
" *on the east bank of the Tule House Slough. We*
" *crossed there and went to the west bank, crossed the*

472 " *slough. Where we crossed, there was just a little water,*
" *probably six or eight inches deep. It was standing*
" *water, not running. After getting to the west side of*
" *that slough, we followed it up still further going north-*
" *erly,*
" Mr. McAllister. Q—*The same slough?*
" A—*Yes, sir; we followed it up about half a mile*
" *further until it run out, ceased to show any depression*
" *or any sign of a slough.*"

T., IV, fols. 470–2.

Again:

" A—We drove nearly due south, still watching to see
" if the stream came in again, or the slough made any
" appearance again.
" Q—Did you find any appearance again?
" A—No, sir.
" Q—Find any slough?
" A—No, sir.
" Q—How far south did you drive to see that?
" A—We drove, it must be two or three miles—until
" we came back down to the slough—that we had headed
487 " off just above the Tule House. We kept some consid-
" erable distance east. We met Captain Schuyler and
Captain Taylor there, and they took a westerly course
from us.
" Q—*You struck the slough, you say—that you call the*
" *Tule House slough, the one that you followed from the*
" *Tule House before?*
" A—*Yes, sir. We struck it about the same place we*
488 " *had been at before; struck the head of it—the end of it.*
" *We then came on up southerly to the Tule House, on*
" *the east bank of that slough, following it.*
" Q—On the east bank?
" A—Yes, sir. Came to the edge of the water, on the
" east side of it at that time: After reaching the Tule
" House, we camped there that night. *The next day we*
" *came in a southerly direction, following down along this*
" *way on the bank of the same slough, the Tule House*
" *slough.*
" Q—*Can you point it out on the map, starting from*
" *tha Tule House there; about the course you took on*
" *map* 3?
489 " A—*If this is correct here, we came right around,*
" *about two miles—about two miles and a half, right in*
" *on that* [*referring to map* 3.]

" Mr. McAllister. *On the east side of the Tule House*
" *slough?*
" A—*Yes, sir. Bearing a little further west, as we got*
" *down some distance. We followed that from two to*
" *three miles from the Tule House. We drove right into*
" *it, towards the latter end; drove in the bottom of it,*
" *the bed of it.*
" Q—Did you see any branches running into it or out
490 " of it?
" A—No, sir.
" Q—*You followed it two or three miles? Where did*
" *that bring you to? Can you fix the point about, on*
" *that map?*
" A—*It brought us, I should judge, to about this point,*
" *here, on Section* 13, *Township* 26 *South, Range* 21
" *East.*"

T., IV, fol. 486 to 490.

Murray F. Taylor testified:

" From
" the round corral we went to the Tule Shanty, which is
" on Section 32, Township 25, Range 22. We found water
" north of the Tule Shanty. It was stagnant water.
" *After reaching the Tule House we traveled down the*
" *slough on the bank of which the Tule House stood. By*
" *down I mean north or towards Tulare Lake, and went*
409 " *about a mile. About a quarter of a mile from this house*
" *we went on the east bank of the slough, and then left*
" *the house. About a quarter of a mile from the house*
" *we crossed over to the west bank, then we followed this*
" *slough down as I think.*
" Q—How deep and wide was that slough at the point
" where you crossed?
" A—At the point whese we crossed it had about a foot
" of water in it. It was about thirty feet wide,
" Q—*How deep were the banks?*
410 " A—*The banks were about two feet.*
" Q—*Below the surrounding country?*
" A—*Yes, sir; about two feet. The banks were about*
" *two feet to the level of the surrounding country. In*
" *crossing that slough we followed the course down; as I*
" *thought, through the edge of Section* 20. *Following the*
" *course of the slough, in Township* 25, *Range* 22. *Upon*
" *reaching this point in Section* 20 *the slough had run out*
" *entirely, and we had come out on the flat tule land.*"

T., III, fol. 408 to 410.

Again:

" After going back to the trail we
" had made the day before, we came up on the west bank
" until we reached the point where I crossed this slough
" that the Tule House was on the day before. Then I
424 " crossed at the same point and came to the Tule House.
" *After reaching the Tule House that day, we traveled up*
" *this slough that the Tule House was on, a short distance*
" *south, following south. The water runs the other way.*
" Mr. HAGGIN. Q—Well.
" A—*I traveled over the slough from the Tule House. I*
" *followed, I suppose, about three miles into Sec.* 13. *I*
" *think that is about the way it runs, except that when it*
" *got to this point it there forms a junction with this slough*
" *which runs on the west side of the swamp; that is,*
" *through Sec.* 13, *T.* 26, *R.* 22.
" Q—In following up that there, were there any inlets
425 " or outlets or channels that branched from it?
" A—None at all that I could see. *It just seemed to*
" *run across and form a connection at this point with this*
" *channel over on the west side. There were no branches*
" *that I saw. At the Tule House this channel was* 100 *feet*
" *wide; may be more. It was a pretty wide channel, and*
" *five or six feet deep, and it would be of different widths*
" *and different depths as you go along. Sometimes it would*
" *not be over fifteen feet wide and two feet deep. It would*
" *seem to depend on the character of the land through*
" *which it passes, whether the banks were high or low.*
" *After reaching Sec.* 13 *it formed a junction with the*
426 " *slough on the west side. I had an idea that this was the*
" *slough we had touched the day before; consequently I*
" *drove down this slough, following it in all its windings,*
" *until I got to the place where we lunched on Sec.* 1. *That*
" *is about two miles, I should judge. After reaching that*
" *place where we had lunched the previous day, I just*
" *retraced my steps and came back and followed this slough*
" *up to a point on Sec.* 13, *where it turned off. Then I*
" *kept on up until I got, as I supposed on to Sec.* 24 *going*
" *southward. Along in Sec.* 24 *the slough ran out, and*
" *from the time we passed the point where the Tule House*
" *slough joined this slough, we could see that it was run-*
427 " *ning out all the time. When we got on Sec.* 24, *we could*
" *see that the slough was lost and disappeared entirely.*"

T. III, fol. 423–7.

J. D. SCHUYLER, Civil Engineer, and Deputy State Engineer, testified:

" We took quite a circuitous route. *We went*
" *down that slough that was there at the Tule House on*
" *the east side, and then returned to the Tule House for*
" *over night. Then we followed the slough up south-*
" *ward a mile or two, and then northwes'erly to the west-*
" *ern side of the swamp.*
" Q—*In following it down, did you follow the margin*
" *of any slough?*
" A—*Yes, sir. I don't think that slough is near the*
814 " *eastern margin of the swamp land. I followed the*
" *slough along there—Captain Taylor and I on the west*
" *side, and Mr. James and Mr. Jackson in another wagon*
" *on the eastern side. We followed down on the west-*
" *ern side of the slough until we reached a point where*
" *the slough joined another slough on the western side*
" *of the swamp, where the high land came in, north-*
" *west. We followed the meanderings of the slough*
" *which goes by the Tule House until we reached that*
" *point, and kept on the bank of that pond until we ar-*
" *rived at the western boundary of the swamp land dis-*
" *trict. There was a large channel at the Tule House.*
815 " *We crossed that near the Tule House, myself and Mr.*
" *Taylor, and then kept on the margin of the slough*
" *until we got near the high land on the west side.*
" Q—*Did you cross, or see any slough making into*
" *this near the margin of which you were passing?*
" A—*Yes, sir. Near the Tule House there was a*
" *channel striking off to the northwestward. We saw*
" *no other channel after that.*
" Q—*Did you meander along the course of this*
" *slough?*
" A—*Yes, sir. I don't know what distance we followed*
" *it; but I think it was, perhaps, 3 miles; we followed it*
816 " *until we came to the high land on the west side* We
" crossed no water. We saw water in pools all of the
" way along there. Where we saw the water was in this
" slough, in holes; no running water.
" Q—*As you approached the high land on the west*
" *of the swamp land district was there any change?*
" *You followed this slough up to the margin of it. Did you*
" *make any connection—*
" A—[Interrupting;] *Yes, sir; there was a direct con-*
" *nection with the deeper slough on the western side,*
" *which contained a deep body of still water. We could*

"*not see the bottom of it. That is the western slough*
817 "*that this cross-slough connected with; the water in it ap-*
"*peared to be quite deep. We crossed around the head*
"*of the water in it, southward, crossing this cross-slough*
"*in the meantime.*
" Q—In passing on southward, did you cross any
" channel in connection with it, in passing around the
" southward?
" A—Not what appeared to be a channel; no, sir;
" nothing resembling the sloughs we had just crossed.
" Q—Did you get to the end of this deep slough that
" you speak of on the west side?
" A—Yes, sir; we passed around the south end of it.
818 "*Then we followed north along that slough until we*
"*came to the end of the water that was in it, perhaps*
"*one and a half or two miles.* The slough grew nar-
"rower and narrower as it came to the northern end,
" and it seemed to come to a point, or went out, and the
" bottom raised up to the level of the plain. Then we
" returned to the same point in the slough."

T., IV, fol. 813 to 818.

If your Honors will look at Exhibit "A," annexed to the findings in this case, you will see that the margin of Tulare Lake came to the center of Section 20, T. 25 S., R. 22 E., the section to which all four of these witnesses state they followed the Tule House Slough going north, then by following the witnesses south and west from the Tule House to Sec. 13, T. 26 S., R. 21 E., your Honors will see that they had to follow a slough from five or six miles, and every foot of it running through the land belonging to plaintiffs, and described in the amended complaint.

Two of these witnesses state that they think this slough where it runs by the Tule House and cross slough to the west side are correctly delineated on our Map 3.

James, T. III, fol. 201 and 272-3;
Jackson, T. IV, fol. 488-9.

This is not all. A party of four had been sent to the Tule House before Mr. Taylor piloted the parties

whose testimony we have given. They were the same M. F. Taylor, and with him were E. D. Cross, V. Barker and H. A. Jastro. Three of them testify that they found a large slough at the Tule House.

Barker says:

" A—*There was a channel there in front of the Tule* " *House with water in it. I don't think it was running.* " *From the Tule House we went up the channel about—I* " *don't know how far—probably a quarter of a mile; and* " *recrossed to the west side of the swamp.*

" Q—Did you find any continuous channel in crossing " to the west side of the swamp?

" A—When we struck down from the west side and
618 " went down, we crossed a little water there. When we " crossed from the Tule House right at the east side, there " was some water where we crossed, probably three or four " inches deep; mud and water. It was not running.

" Q—*Did you see the end of these channels?*

" A—*I did not follow that through to the end of it, I* " *think; just crossed over it.*

" Q—*In going beyond, did you find any other channel?*

" A—*We struck a channel on the west side. We fol-* " *lowed that down about, I should judge, two or three* " *miles—two miles. At the end of that two or three miles* " *it seemed to run out.*"

T. III, fol. 617-18.

Cross testifies:

" From the Round Corral we went up on " the east side as far as the Tule House; *at the Tule* " *House I found some water in the slough west of the* " *Tule House;* then we went up and crossed over to the " west side; in crossing to the west side we saw water in " the ponds along from place to place.

" Q—*Did you find any slough going along across to* " *the west from the Tule House?*

" A—*Yes, sir; there is a part—there is quite a piece*
478 " *there; there is quite a deep slough, or partial channel,* " *along there for five or six miles, I should judge; it runs* " *north and south, I should judge, principally; it does* " *not run quite north and south; we followed up that* " *slough, went up around the slough and crossed over to* " *the Round Corral and camped, and we staid over night* " *at the Round Corral.*"

T., III, fol. 477-8.

* * * * *

" Q—What did you find on that trip going westward
" from the Tule House?
" A—We found some ponds of water, and went around
" them—traveled around the ponds and went across to
" the opposite side of the swamp; then we recrossed the
" swamp to the Round Corral.
481 " Q—*Did you find any channel on your route back to*
" *the Round Corral?*
" A—*Well, I suppose that is a channel; the channel*
" *is about five miles in length, I should judge.*
" Q—*Was it a continuous channel?*
" A—*For five miles.*"

T., III, fol. 480–1.

We do find one witness who testifies that there was even *no indication of a channel at the Tule House*, and that was H. A. Jastro, who accompanied Taylor, Barker and Cross, all of whom find a channel, and follow it for some distance.

JASTRO says:

" Q—*Did you find any indication of a channel at the*
" *Tule House?*
367 " A—*No, sir.*
" Q—You found water, you say, there?
" A—Yes, sir. In a big hole right there near the
" tule shanty.
" *From the tule shanty, we went across the swamp*
" *land southwesterly, and struck the slough on the west*
" *side of the swamp. We traced that southerly, proba-*
" *bly, about 3 miles. I did not trace it further because*
" *there was nothing more to trace. The water ran out.*"

T., III, fol.366–7.

But even he, who could see no indication of a channel at the Tule House, finds a channel three miles long on the west side of the swamp land.

We have then seven witnesses of defendant, all sent to the Tule House to examine the swamp land tract to see if a slough could be found running through plaintiffs' land.

By looking at defendants' Map "I," plaintiffs' Map

"3," or Exhibit "A," made a part of the finding, or at Diagram "E," inserted in defendants' brief, the Court will see that plaintiff owned all the land for the whole width of the swamp and overflowed land on Buena Vista Slough for a mile north and six miles south of the Tule House, so that any channel through the swamp land at the Tule House, or north or south of it, must have run through the land of plaintiffs.

Of these seven witnesses, six found a well defined slough at the Tule House. Four of them examine that slough from the Tule House, find it running north one and one-half miles, more or less, and nearly, if not quite, to the margin of Tulare Lake. They find it running south to Section 13, T. 26, R. 21, four miles at least in a straight line, and then connecting with a channel on the west side of the swamp land, which they testify is from two to five or six miles long. Every foot of this channel running south and southwest from the Tule House to Section 13, T. 26, R. 21, and of the channel on the west side of the swamp land, and nearly all of the channels running north from the Tule House, must have run through the lands of plaintiff.

So far, we have only given the testimony of defendants' witnesses.

We will now refer the Court to the testimony of a few witnesses called by plaintiffs, who testified to the existence of channels at the Tule House, and running north and south from it.

We will first refer the Court to Map 3, made by Mr. McCray, which shows two continuous sloughs from the line between Townships 27 and 28 South, to the line between Townships 24 and 25, and on this map Mr. McCray has placed at the different points the width and depth of the slough thus: 200x16.

He says:

459 " Q—I notice that in this map you put certain figures
" along these sloughs. What do those figures indicate?
" A—Those indicate the width and depth at the points
" where those figures are. The first figures of those
" along the sloughs indicate the width of the slough at
" the point where they are put on, and the second the
" depth."

T. II, fol. 459.

On pages 109 to 114 Mr. McCray describes the east and west channels that run through the whole length of the country shown on this map. He first takes up the west channel, giving its average width and depth by Townships. Then he takes up the east channel, or the one that runs by the Tule House, commencing on page 111.

He says the channel through Township 27 S., R. 22 E., and running through Sections 33, 21, 16, 9 and 4, would average through the Township 100 feet, and between 3 and 4 feet deep. (T. II, fol. 442.) Then of the east channel in T. 26 S., R. 22 E., the one south of the Tule House, or the very channel that Taylor, Schuyler, James and Jackson must have followed in going south and southwest from Tule House to the west side of the swamp island. The witness says:

446 " Q—*Then take the next township* 26, *S. Range* 22 *E.,*
" *will you take the main channel at Buena Vista Slough*
" *that runs through that and follow it through the Sec-*
" *tions, through what Sections does it run?*
" A—*On the south boundary of Sec.* 32, *in Town-*
" *ship* 26, *Range* 22, *then it runs through Sec.* 33*; the*
" *west portion of it. Then through the west portion of*
" 28*; then diagonally across* 20, *and across* 18 *and* 7, *touch-*
" *ing* 8, *runs diagonally across* 5, *and northwesterly and*
" *diagonally across Sec.* 32 *in another township. The*
" *north line* 5 *giving the township line. The condition*
" *of the slough through that township is quite marked*
447 " *and prominent a great portion of the way; that is the*
" *eastern slough I refer to, and through T.* 26 *S., Range*
" 22 *E. The average width, I should think, would be*
" *about* 80 *feet, and the depth* 3½ *to* 4 *feet.*

" Q—*What portion of that 6 or 7 miles running through*
" *there has well defined banks?*
" A—*There is almost all of it, and the portion that has not*
" *well defined banks is where it divides, running around*
" *an island, or something of that kind, forming a small*
" *island during low water. During high water, perhaps*
" *the island is covered in many places, where it would*
" *have a width of several hundred feet; where these*
448 " *islands are, as a rule, the banks are not so steep as the*
" *places where it is confined to one channel.*
" Q—*That is where it comes to an island it runs on both*
" *sides?*
" A—*Yes, sir.*"

T. II, fol. 445–8.

On cross-examination, Mr. Flournoy calls for the field notes of the survey from which Map 3 was made, and the witness produced and read them, giving the width and depth of both branches of Buena Vista Slough that appear on Map 3.

" Q—I have not seen those field notes of Map No. 3 yet;
" where are the field notes of No. 3?
" A—I have them in my pocket. They are in this book.
" This is my own private field book. It embraces my sur-
" vey. In this book are other things that are private and
" belonging to other persons.
" Q—Well, if you will make copies of them they will be
" more useful to us, and we won't handle your book at all.
" A—I can show it to you for your satisfaction.
1617 " Q—We would have to use the book. I would prefer
" you just to make a copy.
" Mr. McAllister. Can't you read the field notes off to
" the reporter?
" A—I presume so. It covers several pages; quite a
" number of them.
" Q—Are there sketches in them, or simply writing?
" A—Simply writing, no sketches.
" Mr. Flournoy. If you will let us have that we can
" have it copied, or you can copy it for us.
" A—I can copy that for you."

T., II, fol. 1616–17.

He then reads the notes of his whole survey north of the Bonestell House down to the township north of the Tule House, in Township 25 S., R. 22 E., and

distances and courses along the east and west branch of Buena Vista Slough to a point north of the most northerly land of plaintiffs, and giving width and depth of the slough as he goes along. (T., II, fol. 1627 to 1644).

The width and depth of the east and west channel the witness says he placed on Map 3.

" Q—I notice that in this map you put certain fig-
" ures along these sloughs. What do these figures in-
" dicate ?
" A—Those indicate the width and depth at the points
" where these figures are. The first figures of those
" along the slough indicate the width of the slough at
" the point where they are put on, and the second the
" depth."

T., II, fol. 459.

By examining this Map 3, it will be seen that the size of the east channel of Buena Vista Slough is given at sixteen different points, and at about equal distance apart, where it runs through this township south of the Tule House, 25 S. 22 E., as follows:

In Section 33, 100x4;
" " 33, 100x3½;
" " 33, 100x3;
" " 28, 50x3;
" " 28, 60x3½;
" " 20, 80x3½;
" " 19, 80x4;
" " 18, 70x4;
" " 7, 200x4½;
" " 7, 90x4;
" " 8, 75x4;
" " 5, 150x5;
" " 5, 200x4;
" " 5, 120x4;
" " 5, 100x6;
" " 5, 150x4.

Then passing to Section 32, in the next Township North, 25, S., R. 22 E., the most northerly section owned by plaintiffs on the east slough and upon which is located the Tule House, the size is given at four different points; and again at about equal distances apart as follows:

120x4½;
100x5;
200x5;
200x16, at Tule House.

The witness McCray testifying in relation to the west channel of Buena Vista Slough where it runs through this township south of the Tule House, says:

" The western channel ran through this
" Township 26 S, Range 22 E., is a well marked slough.
" It is of different widths and has different depths, and
" it will average something like the other, perhaps 80
" feet wide and from 3 to 4 feet in depth.
" Q--How much of that 6 or 7 miles has well defined
" banks?
" A—Well, I should say about nine-tenths of it.
449 " Q—And what is the balance, the other tenth; what
" is the condition of that?
" A—Well, it is also a slough, but not so prominent,
" perhaps, as the nine-tenths. Nine-tenths of it is a
" very deep slough.
" Q—Will you trace that western slough through the
" different Sections, the western channel?
" A—Beginning at the south point of line of Sec. 31,
" it runs northerly through it, touching Sec. 30 and a
" portion of Sec. 25, which is in T. 26 S., R. 21 E.
" Thence from that point continuing through that T. 21,
" S. R. 26 E., running through Sec. 24, through the east-
450 " erly portion and western portion of Sec. 13; through
" the easterd portion of Sec. 12, and the eastern portion
" of Sec. 1, to the township line. These last Sections
" are in T. 26 S., R. 21 E., except some portions of Sec,
" 21, where it touches 26, I only surveyed this slough
" in Sec. 25 S., R. 22 E. to the north boundary line of
" Sec. 32. Over that portion it is a very wide, deep
" slough, having perhaps an average width of 200 feet.
" It now has water in it, and at almost all times is swim-

"ming for a horse. I only surveyed to the north bound-
"ary line of Sec. 32; it was really surveyed only to the
451 "Tule House, which is near the north boundary line of
"Sec. 32."

T., II, fols. 448-451.

He also gives the size of the west channel, where it runs through plaintiffs' land in Township 26 S., R. 21 and 22 E., at sixteen different points and at about equal distances apart, as follows:

In Section	24,	60x 4;
"	24,	80x 4½;
"	24,	80x 5;
"	13,	80x 4½;
"	13,	90x 5;
"	13,	116x 4½;
"	13,	80x 5;
"	12,	90x10;
"	12,	100x12;
"	12,	100x12;
"	12,	90x10;
"	12,	80x10;
"	1,	160x 6;
"	1,	100x 4;
"	1,	40x 3½;
"	1,	30x 3½.

See Map "3," and T., II, fol. 451-2.

Every one of the points herein referred to, where the width and depth of Buena Vista Slough is given, is within the lines of lands of plaintiffs, described in the amended complaint.

Then we have the testimony of Mr. Wible, who has lived on Buena Vista Slough continuously since 1876, and who, while this case was in progress of trial in the Superior Court, drove to the Tule House, which is situated near the north line of Section 32, Township 25 S., R. 22 E., and at the Tule House drove into the

east channel of Buena Vista Slough, and followed that channel up to Section 33, in Township 26 S., R. 22 E., finding all that distance a well defined channel, and from 75 to 100 feet wide (T., II, fol. 1782), and from 3¼ to 4 feet deep. (T., II, fol. 1783.)

This witness first drove down and along the west channel of Buena Vista Slough, where it runs through the township south of the Tule House, and of this west channel, he says:

" Q—Where did you next come to the slough?
" A—Drove right on to the edge of the bank at the
" Adobe Holes.
" Q—What was the condition of the water there?
" A—Lots of water there, wide and deep.
" Q—Was it running?
" A—Yes, sir.
" Q—Where did you go to from there?
" A—Then I went and struck the slough or channel at
1775 " the Adobe Chimney Camp of Miller & Lux, or Crocker's
" Camp, about four miles below the Adobe Holes."

T., II, fols. 1774–5.

The Adobe Holes are on Sections 21 and 22, Township 27 south, R. 22 E, (see Map "I,") and this point or camp, four miles below, is on Section 31, Township 26 S., R. 22 E., near the township line between Townships 26 and 27. (See Map 3.)

" Q—What was the condition of the channel of the wa-
" ter there?
" A—The channel was dry there; no water running.
" Q—Did you follow the slough any further?
" A—Yes, sir.
" Q—How far?
" A—Well, below the channel there very little. Then
" the next place I struck the channel at Epperly's Camp;
" that is three or four miles from the Crocker Camp.
" Then I followed the channel right on from there. It
1776 " was nice driving right in the channel; must have fol-
" lowed it some three or four miles. Where I first struck
" the channel and there was no water, the channel was
" wider and deeper than at the place where I first struck it.
" Mr. Houghton. Q—What was the average width of

" it from the place where you first came to it until you
" left it?
" A—Well, I guess it would average a good deal over
" 100 feet. Then the average depth to the point where
" it was dry was 4 or 5 feet in some places; others, 10
" feet. The point where I first reached the slough, and
1777 " there was no water, was on Section 20, in Township 27
" South, Range 22 East. No, that is the point where I first
" reached it and found water. The first point that I
" reached the slough and found no water was Section 31,
" in Township 26 South, Range 22 East.
" Q—How far did you follow that dry channel from that
" point?
" A—Left right here, come on here, then took the chan-
" nel about here somewheres.
" Q—Where is that?
" A—That is on a line between Section 24 and 15, in
" Township 26 South, Range 21 East.
1778 " Q—Then how long did you follow along the dry chan-
" nel?
" A—Well, 3 or 4 miles to a point very nearly opposite
" the Tule House. It was not all the way dry. There
" was a big, deep channel there, and I don't know how
" much water there was standing in it. There was no
" running water. I followed the channel where I found
" no running water. 3 or 4 miles down to Section 36, in
" Township 25 South, Range 21 East; and from there I
" went to the Tule House.
" Q—What was the condition of the channel that ran
" from the west channel to the Tule House when you
1779 " crossed there?
" A—Dry. It was from 50 to 75 feet wide when I
" made any note of it. It was deep. It was a deep, big
" channel at its intersection."

T., II, fol. 1775–9.

Then testifying as to the eastern channel that passed the Tule House, the witness continues:

" *At the*
" *Tule House I found the eastern channel. There was*
" *water there, standing water, no running water. From*
" *the Tule House I followed up the eastern channel. I*
" *drove right in the channel, in the bed of it; not right*
" *from the start; after I got a little above the Tule House*
" *I drove right into it. It was a little damp at the bank.*
" *After I got a little ways above the Tule House I went*

1780 " *right into the channel. I drove probably a half a mile*
" *from the Tule House, and then drove right into the*
" *bottom of it. Then followed right up the channel.*
" Q—*How far along the channel of that slough did you*
" *drive after leaving the Tule House?*
" A—*I drove two hours.*
" Q—*Did you, in driving along that channel, come to*
" *any running water, or not?*
" A—*Yes, sir.*
" Q—*Where?*
" A—*Above Salt Slough. It might have been on a*
" *direct line a mile and a half or two miles above Salt*
1781 " *Slough, where I came to running water. That would*
" *be on the map somewhere in Section* 33, *in Township*
" 26 *south, Range* 22 *east.*
" Q—*What was the condition of the bed of that channel*
" *where you drove along?*
" A—*Well, it was dry. Very fair driving right at the*
" *bottom of the slough.*
" Q—*As to its being regular and even?*
" A—*A very nice, even channel.*
" Q—*How wide was that channel from the Tule House*
" *to where you struck the water?*
" A—*I should judge it was—where the bank is perfectly*
1782 " *clear and smooth, with the exception of a little growth*
" *of weeds that was growing in it, just starting up from*
" *the moisture right straight across, it would average* 75,
" *or probably* 100 *feet.*
" Q—What was the growth in that channel?
" A—Nothing at all except occasionally a little duck
" clover or smart weed, or something of that kind.
" Q—*What was the distance that you drove along that*
" *channel from the Tule House before you struck the*
" *water?*
1783 " A—*Two hours.*
" Mr. Garber. Q—*That is, that two hours drive?*
" A—*Two hours drive. I drove probably, well, it must*
" *be* 12 *miles, anyhow; it might have been more and it*
" *might have been less. I was more than two hours driv-*
" *ing it. I think it was two hours and a half.*
" Q—*How deep was the channel upon an average*
" *where you drove along its bed in the buggy until you*
" *struck water?*
" A—*The clear channel was about from three feet and*
" *a half to four feet deep on an average, I guess.*
1784 " Q—*Did you in making your drive keep in the chan-*
" *nel all the time?*

" A—*Yes, sir.*
" Q—*What was the appearance of the first water that*
" *you came to in that channel?*
" A—*Well, the water was clear and running.*
" Q—*Rapidly?*
" A—*Yes, sir; it was moving right along.*
" Q—*How long did you follow up the channel after*
" *striking water?*
" A—*I drove right along the water until I struck the chan-*
" *nel that came in from the western channel, and crossed*
" *that, and followed right on up the channel. There was*
1785 " *room enough along the water to drive in, except where*
" *it was too steep.*
" Mr. McAllister—I do not understand whether he
" was driving up the slough or coming up this way?
" Witness. Coming up. The water was running down
" the stream.
" Mr. Houghton. Q—*I understand you to say you*
" *came to water somewhere in Section* 33, *Township* 26
" *south, Range* 22 *east?*
" A—*Yes, sir.*
" Q—*How far, please designate on the map, was it*
1786 " *that you drove along on the side of the channel by this*
" *running water from Section* 33?
" A—*I drove off in there somewhere.* (pointing.) *That*
" *is Section* 33; *then I followed this channel and*
" *crossed the channel. I followed this east channel above*
" *the point designated on this map, that to the south end*
" *of Section* 27, *in Township* 27 *south, Range* 22 *east.*

T. II, fol. 1779–86.

* * * * * *

" Q—*How far along that slough did you ride before*
" *you found any water outside of the banks from the*
" *slough?*
" A—*Well, probably* 15 *or* 16 *miles.*
" Q—*I mean from where you first came to water, where*
" *it would be outside of the bank?*
1792 " A—*I found some water in this delta here, coming*
" *from Goose Lake, about three miles probably, up here*
" *opposite Goose Lake.*
" Mr. Garber—*Let me see if I understand that. You*
" *mean to say from the point where you first came to wa-*
" *ter to where you first found any outside of the bank,*
" *was about three miles?*
" A—*I think it was. I traveled that far before I found*
" *any water outside of the bank. I drove in the channel*
" *right alongside the water.*

" Q—*What was the average width of the channel where*
" *you found it, and the water running in it?*
1793 " A—*Probably from* 50 *to* 75 *feet. It was wider*
" *where I first found the water.*
" Q—*What was the depth of the channel?*
" A—*I can tell better about the depth where there was*
" *no water, than I can where there was water, although I*
" *was actually across where there was water.*"

T. II, fol. 1791–3.

On cross-examination this witness is questioned as to the size, condition and appearance of the east channel where it runs by the Tule House, and on each section through which it runs in the township south of the Tule House, T. 26 S., R. 22 E. He says:

" *At the Tule House I found a deep place*
" *in there where the water was standing there.*
" Q—*How deep was the channel there?*
" A—*Oh, I can't tell you. It must be* 7 *or* 8 *feet, or*
" 10—*the water.*
1981 " Q—*Is it* 20?
" A—*Probably to the bottom of the slough it is—water*
" *and all. After I got there I turned around and went*
" *right up the eastern bank of this eastern branch a little*
" *way. I dedn't go into the channel at the junction on*
" *Section* 32. *I saw it—crossed it right there. Where I*
" *crossed it it was probably* 75 *feet wide. Between* 2 *and*
" 3 *feet deep. with a well defined channel where I crossed*
" *it. No water in it; no tules.*
" Q—*Do you call that a well defined channel down*
" *that way?*
1982 " A—*The water, I think, has to be higher where it*
" *comes out here, The channel that runs across from*
" *Section* 1 *to* 32, *where I crossed it, was* 2 *or* 3 *feet*
" *deep.*
" Q—*When you crossed that water, you come back*
" *up here?*
" A—*I turned up on the bank then and there, went*
" *into the slough right into the channel. I drove right*
" *up the bed of that channel, going south on the chan-*
" *nel. That is the plaee I spoce of driving* 2½ *hours in*
" *the bed of the channel. I then turned up here to Salt*
" *Slough. It took two hours to drive to Salt Slough. I*
1983 " *should judge it was about* 12 *miles in the channel. It*
" *was dry all the way; no water.*

" Q—*Describe that channel.*
" A—*There is water in one or two holes—standing*
" *water.*
" Q—*Describe that channel to me as you found it on*
" *Section* 5, *referring to map?*
" A—*It is between* 3 *and* 4 *feet deep, and from* 75 *to*
" 100 *feet wide, I think.*
" Q—*Is it a well defined channel?*
" A—*Yes, sir.*
" Q—*Any branches in it?*
1984 " A—*No ; sir. I found no branches in it, just going*
" *right up the channel and driving along.*
" Q—*Was there more than one channel through that*
" *section?*
" A—*No' sir. I don't think there is.*
" Q—*Just one defined straight channel, with no*
" *branches?*
" A—*Yes, sir. My reason for that is, whenever I met*
" *an elbow that ran west, I ran against a solid bank.*
" *Whenever I went back, and ran to the extreme point on*
" *the east I ran on a solid bank. The channel had slop-*
1985 " *ing banks through that section, and was* 75 *to* 100 *feet*
" *wide. When we came to the corner of Sec.* 7 *and* 8, *I*
" *came to about the same kind of a channel. As in Sec-*
" *tion* 5, *and from there along up into Salt Slough about*
" *the same. I found water standing there on the*
" *upper end of* 18. *I stopped to water my horses*
" *there. There is a well defined channel all the way up*
" *to Salt Slough, and of the same description, as I gave*
" *for Section* 5. *I think there might have been a lit-*
" *tle water in one or two other places, besides that*
" *standing water on Section* 18 *I never saw it when*
" *the banks were overflowing. From Salt Slough*
1986 " *down* $3\frac{1}{2}$ *feet of water would run through there*
" *without overflowing anywhere. After I got to Salt*
" *Slough, I followed right up the channel—Eastern*
" *channel. I met the water running. It was somewhere*
" *about Sec.* 4 *or* 33, *I think. I think it was running on*
" *Sec.* 33, *in T.* 26 *S., R.* 22 *E. At the place I met*
" *that water the channel was a little smaller, about*
" 40 *or* 50 *feet wide, and I judged about* 3 *feet deep. I*
" *got out there. The water was running over a little*
" *riffle into lower ground. It was* 6 *feet wide and*
" 3 *or* 4 *inches deep. That is all the water that*
1987 " *was there. I followed that water up, and went clear*
" *on up to the break, and found water all the way.*
" *I followed up on the west side of the east channel. I*

"*kept that channel on my left hand going up. I crossed*
"*this channel on Section 4, going from the west channel*
"*into the east channel. Where I crossed this channel*
"*there is not a great deal of difference right there. It*
"*was well defined, no tules in it right there, and proba-*
"*bly 2 or 3 feet deep. There was water running in the*
"*cross channel going down into the east channel. That*
"*water came from the break in the canal. It was run-*
1988 "*ning out of this western channel. I followed up the*
"*eastern channel and found water there. I followed it*
"*right along, keeping the water on my east. I followed*
"*the eastern channel up to the break.*"

T., II, fol. 1980–1988.

J. C. Crocker, who has been raising stock on Buena Vista Slough since 1870, and who has been on the swamp land between Buena Vista and Tulare Lakes the most of the time since that year, and who had a camp or headquarters for his men on both the east and west channels of Buena Vista Slough, where it passes through the township in which is located the Tule House—the Tule House on the east channel, and a camp on Section 13, T. 26 S., R. 21 E., and on Section 31, T. 26 S., R. 22 E., on the west channel (See Map 3)—testified in relation to the slough at the Tule House, and north and south of it, and where it ran through plaintiffs' lands, in Townships 25 and 26 S.

He says:

"Q—Will you look at the diagram marked "3" there,
497 "and see if those channels are correctly delineated on
"there. This map starts at a point just north of Goose
"Lake.
"A—I should judge that was about correct. I would
"not be positive, but I judge from what I know of the
"general shape of the swamp land there, and the shape
"of the sloughs.
"Q—Do you know where the lines of that swamp and
"overflowed land, within that territory, run?
"A—Portions of it. I did not survey it. I know
"only by stakes which I have seen down through on the
"margin of the swamp, and through the swamp.

" Q—Do you know that these sloughs, the two differ-
498 " ent branches of Buena Vista Slough represented here,
" ran through your land in T. 26 S., R. 23 E.?
" A—I just know they ran through our land.
" Q—Do they run through the lands described in your
" complaint in this case?
" A—I could not tell you section for section.
" Q—They run through?
" A—They run through that body of swamp land and
" sloughs, I should judge, about as they are laid down
" there, but I could not tell you.
" Q—They run through the swamp land there that you
" owned?
499 " A—Yes, sir.
" Q—In that township?
" A—In that township.
" Q—How is that as to the township below, that is 25
" S., 22 E. Did they run through the section that you
" have on the south line of that township?
" A—They run through the sections. They run through
" this portion here. I know I helped to run those lines
" around this portion of the land here. I ran up, I
" think, about—I would not be positive—I think we run
" to this township line.
500 " Q—Do you know that slough, Buena Vista Slough,
" runs through the swamp that you owned, or that the
" plaintiffs in this case owned in Township 25 S., 21 E.?
" A—Yes, sir; I know it runs through our lands there.
" I run through the swamp, and I suppose I have always
" seen the stakes there that was laid off as our land.
" Q—Do you know where the limits of your swamp
" and overflowed lands are on the east and west?
" A—Yes, sir.
" Q—Do these channels of Buena Vista Slough run
" between those limits?
" A—Yes, sir."

T., II, fol. 496-500.

On cross-examination, he testified:

592 " Q—Isn't there a well defined channel all of the way
" from Buena Vista Lake to Tulare Lake?
" A—A channel that carries water, there is.
" Q—Is there any one continuous, distinct, defined
" channel from Buena Vista Lake to Tulare Lake,
" through there?
" A—I think there is. I am positive of it.

" Q—Have you followed it up all the way?
" A—I have been over it.
" Q—Every foot of it?
" A—I would not say over every foot of it. I have
" been over every quarter section of it.
593 " Q—You have never seen that channel that water was
" not running in it?
" A—Yes, sir; I have seen it when water was not run-
" ning in it many times.
" Q—How often?
" A—I could not tell you how often.
" Q—When was the first time you did that; no water
" running in it?
" A—In 1871. The next time, I think, was in 1876,
" and the next in 1877, and the next time, I think, was
" a portion of 1878.

T. II, fol. 592–3.

* * * * * *

" Q—Now, Mr. Crocker, from Weed Island down to
" Tulare Lake, or north, how is the slough that you speak
" of, with regard to its being well defined or otherwise?
" A—It is a water course or channel, in places varying
" in depth; a channel in places with sloping banks, and
" in other places rather flat. When filled with water it
" will spread out; at other places it goes in confined
" banks.
" Q—Is that one continuous slough or channel all the
596 " way from Weed Island down to Tulare Lake?
" A—Yes, sir.
" Q—Are there many of them?
" A—There are more than one.
" Q—How many distinct channels are there from
" Wible's down to Tulare Lake?
" A—There are two that I consider prominent water
" channels that go through."

T. II, fol. 595–6.

Again, on cross-examination as to the condition of the slough north and south of the Tule House, he testifies:

" Q—In the channel opposite this hog camp is a por-
672 " tion of the slough which has well defined and promi-
" nent banks?
" A—Not so prominent as it is in other parts of the
" swamp, but more prominent than in some places; not

" the worst nor the best, would be my opinion. That is
" the way it compares with the balance.
" Q—About how deep is the channel there?
" A—When it is full of water it gets very deep. It
" will get up very full before it overflows so as to flow
" over the country. Generally it will run over a horse's
" back. I refer now to the western channel. The chan-
673 " nel is better defined as you go below; better as you
" get further down. It continues so as far down as I
" know the channel, towards the lake. The eastern
" branch of that channel continues clear to the lake from
" opposite the hog camp. It is a well defined channel,
" the course of the current of water. At high stages
" of water it is necessary to swim it."

T. II, fol. 672–3.

Mr. C. W. Clarke, of Sacramento, who has owned land on Buena Vista Slough, and been engaged in the stock business on Buena Vista Slough since 1857, and who visited the Buena Vista Slough country nearly every year since 1865 to 1880, and always going to the Tule House, as his land and cattle were on Buena Vista Slough, near Tulare Lake, testified in relation to Buena Vista Slough, north and south of the Tule House. He says:

" Q—You say that you also followed that slough from
1173 " below the Tule House up to Goose Lake?
" A—At the time that I started there I just struck the
" channel. I had never been in that country before, and I
" had no idea of the country or a map of the country;
" knew the points merely where I wanted to go. We just
" took our horses and traveled along up. There is a place
" up there near the Staten Corral; there was water,
" and down in the slough. There were holes of good
" water. There was another camp up there where we
" could get our water. That was the only one where we
1174 " could get our water for our horses until we got away
" above.
" Q—*What was the width of that slough, the average*
" *width of it from the Tule House up to Gooe Lake?*
" A—*From the Tule House up to Goose Lake is, on an*
" *average of seventy-five or eighty feet, I should judge.*
" Q—*Is it well defined, that twelve miles?*
" A—*Yes, sir; pretty well defined; good bluff, hard*
" *banks.*

" Q—*What was the condition of that between the Tule*
" *House, going north?*
" A—*Well, along there it is a well defined slough.*"

T., II, fol. 1173–4.

F. M. Epperly, resided for five years at Dover's Camp, on Buena Vista Slough, and during all that time was working on the swamp land along Buena Vista Slough. In the fall of 1878, he moved to and located on the West Slough, nearly north of the Tule House, and remained there until the last of April, 1880 (T., II, fol. 2181–2.), and during all this time, working, raising hogs. He says:

" Q—*While you were at that point, between what points*
" *were you working your hogs?*
" A—*I was working from the Adobe Holes down to the*
" *Tule House. I was on both sides of the swamp, and all*
" *through in different directions.*
2184 " Q—*How often would you cross the swamp land dur-*
" *ing the time you were there on those sloughs?*
" A—*Well, a number of times. Most every day I was*
" *riding across those lands. I spent my time in looking*
" *after my hogs in that swamp, all the time in the slough*
" *there.*
" Q—When you left that camp, where did you then go?
" A—I then went up to this Dover Camp, back to the
" Dover Camp again. That was in April, 1880.
" Q—What were you doing at that point when you
" went back there?
2185 " A—I was still working them hogs, raising hogs. I re-
" mained there from April, 1880, up to the present time,
" and have been working there ever since.
" Q—Between what points have you been working your
" hogs since you went to the Dover Camp?
" A—Well, from about the lower end of Weed Island,
" about nine miles down in that swamp there, on about
" the same range; the hogs went in on about the same range."

T., II, fol. 2183–5.

After testifying to the fact that from the fall of 1878 to April, 1880, he had spent all of his time on Buena Vista Slough between the Adobe Holes ond the Tule House, he is asked:

" By Mr. Houghton. Q—*What is the condition of*
" *that channel from Salt Slough down to what is known*
2209 " *as the Tule House?*
" A—*It is a well defined channel all of the way. That*
" *channel must be—I think it would average five feet, if*
" *not six, and it is from a hundred to one hundred and*
" *fifty feet wide.*
" Q—*Have you ever been in that channel?*
" A—*I have. I have traveled that channel, right in*
" *the bed of that channel, from the Tule House to the*
" *mouth of Salt Slough; I don't remember of traveling*
" *any farther north or south in that channel; I have*
" *crossed it in different places above that.*
" Q—*What is the size of that channel for the first two*
2210 " *miles south of Salt Slough?*
" A—*Well, I think that that channel from the north of*
" *Salt Slough, for two miles there, will average, anyway,*
" *fifty feet in width, and I think the channel will average*
" *something near four feet in depth.*"

T., II, fol. 2208–10.

This witness is also questioned as to the size of the west channel north from the adobe holes.

" Q—*What is the condition of the channel from the*
" *adobe holes down to a point opposite Salt Slough—the*
" *west channel, west from Salt Slough?*
" A—*A portion of the way there is a well defined chan-*
" *nel, and other parts of it there is a kind of flat chan-*
" *nel. I think where it is flat it would be about a hun-*
2215 " *dred feet in width. I think that channel will carry*
" *about two feet and a half of water in the widest place*
" *there; it would be deeper in other places.*
" Q—*About two feet and a half of water in there in the*
" *shallow places? How much land will it overflow?*
" A—*Well, right at those shallow places I think it will*
" *overflow one-quarter of the land that is lying up along*
" *there. It might be a hundred feet wide at those shal-*
" *low places, or more; I could not tell you as to that; I*
" *couldn't give you no permanent answer on that, because*
" *I never saw any of those places measured.*
" Q—*What did you say would be one hundred feet?*
2216 " A—*Those wide places in the swamp where the water*
" *spreads out.*"

THURSDAY, April 28, 1881.

Testimony of F. M. EPPERLY [Continued].

" By Mr. HOUGHTON. Q—*What is the size of the*
2217 " *west branch of Buena Vista Slough from a point op-*
" *posite Salt Slough, or due west from Salt Slough down*
" *to a point opposite the Tule House?*
" A—*Well, as well as I recollect there is a well defined*
" *channel from a point about due west of the Salt Slough,*
" *opposite, pretty near, nearly due west or opposite the*
" *Tule House. All along in there there is a well defined*
" *channel. I have been along that slough a number of*
" *times; I could not tell the number.*
" Q—*Have you been all along it between those points,*
" *between a point west of Salt Slough and a point west*
" *of the Tule House?*
2218 " A—*Yes, sir; I have passed all along there, across it*
" *in different places.*
" Q—*Well, then, about how wide will it average?*
" A—*Well, I should think it would average nearly one*
" *hundred feet.*
" Q—*How deep?*
" A—*On an average I think it would be six feet deep.*
" *Some places it is a great deal deeper than others.*
" Q—*Is there a slough running from the west slough to*
" *the east, at or near the Tule House?*
" A—*About three or four miles; if I recollect right,*
2219 " *maybe five, above the Tule House, there is a slough*
" *runs out of the west channel, and makes across into the*
" *east channel, that the water passes through when the*
" *water gets—I suppose when the water would get to be*
" *four or five feet deep, maybe not so deep, in the west*
" *channel. It will pass through from that channel into*
" *the east channel.*
" Q—*How wide is that connecting slough that you*
" *spoke of there?*
" A—*Well, that is a flat slough; it must be one hundred*
" *or one hundred and fifty mide, maybe two hundred*
" *feet wide. It is a wide, flat slough. That slough*
2220 " *would carry without overflowing its banks, I think it*
" *would carry, four feet of water.*
" Q—*I ask you, Mr. Epperly, to look at this map, Map*
" 3. *Here is the Tule House, and there is a slough on*
" *the map, running across, just above it. Is that the*
" *slough you refer to?*
" A—*Yes, sir.*

" Q—*Is that about the locality of it?*
" A—*That is about the locality of it, somewhere near*
" *there. I think it intersects this slough at least three*
" *miles above the Tule House. I may be mistaken.*
2221 " Q—*Is not there a slough that comes right out at the*
" *Tule House?*
" A—*Yes, sir; there is a branch of this slough runs*
" *off, comes in across there, and connects at the Tule*
" *House; that is a branch of this same slough.*
" Q—*Then this slough that you have been testifying*
" *about is the slough that runs across above the Tule*
" *House?*
" A—*Yes, sir.*
" Q—*What kind of a slough is that that runs across*
" *from the west, that you speak of, from the west slough*
" *to the east, and connects at the Tule House?*
" A—*Well, that is a shallow slough; it is not very deep.*
2222 " *I couldn't say correctly as to how deep the water would*
" *have to be in the western slough before it would run*
" *into that connecting slough, because I never saw the*
" *water running in the slough there.*
" Q—*Do you know which bed is the higher of the two?*
" A—*The main channel is the lowest, it is the lowest*
" *in the main slough. The bed of this side channel is*
" *higher than the bed of the main slough; there has to*
" *be some water in the main slough before it will run*
" *out, but how much I don't know.*
" Q—*How long during the high water in the spring,*
2223 " *when the snows are melting, does the water, running*
" *down through Buena Vista Slough, usually remain out-*
" *side of the channels?*
" A—*Well, it generally gets back into the channels the*
" *last of July, when there is a heavy head of water run-*
" *ning down. If there is not a heavy head of water*
" *running down, it will come back into the channels*
" *sooner. It depends altogether upon the amount of*
" *water that is coming down the river.*
2224 " Q—*Well, how did the water, during the years you*
" *were there*—1872, 1873, 1874 *and* 1875—*continue to*
" *remain after it had gone back into the channels?*
" A—*Well, in those shallow places in the channels, the*
" *water would be spread out. When the channel was well*
" *defined, most of the water would run in the main*
" *channel.*"

T., II, fol. 2214 to 2224.

We then have the testimony of Elisha Stevens, who ran up Buena Vista Slough in a boat, from Tulare Lake, for a distance of five miles.

He says:

" *I was on Tulare*
" *Lake, with my boat, 20 years ago, nearly, I should think. I*
" *was there with my boat and saw water coming out of*
" *Kern River, at the head of Tulare Lake, at the south-*
" *ernmost part of it, and I went up the south part of it. I*
" *went up nearly five miles.*"

T., II, fol. 151.

F. A. Tracy, who owned land on Buena Vista Slough, and lived on or near it from 1863 to 1879, and who was all that time engaged in raising cattle and running them along Buena Vista Slough, from Buena Vista to Tulare Lakes, testified fully as to the condition and size of Buena Vista Slough, north and south of the Tule House.

He says:

" Q—Then how many different points do you suppose
" you have crossed Buena Vista Slough at between town-
" ships 27 and 28 to Tulare Lake?
" A—I have crossed that, I suppose, twenty times in
" one week, for one trip. I may not be there again for
949 " a month, and then perhaps the same number of times
" again.
" Q—Do you suppose that you have crossed that
" slough there between those points which cover eighteen
" miles, and on every section of land that the slough
" crosses?
" A—I don't think I have crossed it just straight. I
" have traveled up and down, crossing and recrossing,
" probably crossing back and forth in many places.
" Q—Do you think you have been on that slough on
" every section that it runs through between those
950 " points?
" A—Yes, sir. I think I have been on the slough—
" because it is natural for me to follow up and down
" the slough frequently; and in following it up and down
" I think I took every section."

T., II, fol. 948–50.

He is then questioned as to the slough where it runs through the townships north and south of the Tule House.

" Q—*What was the condition of the channel between* 26
" *and* 27 *south and* 25 *and* 26 *south.*
" A — *This eastern channel is a channel all the way*
964 " *through; I have seen water rnnning the whole way; run-*
" *ning through the channel from one end to the other.*
" Q—From this point? (referring to map.)
" A—No; down here, you go around here this way.
" Q—Is that ford four miles north of Goose Lake
" where it would commence?
" A—*From there down the channel, is very much as rep-*
" *rcsented there, I should think, on the map*
" Q—*How wide does that channel average that runs*
" *through that township, running through townships* 26 *S.*
" *and* 22 *E.*
" A—*That is a channel, I should think,* 100 *feet wide.*
965 " Q—*What was the condition of the other channel, or*
" *what we call the west channel that ran through that*
" *township?*
" A—*Well, that was a good wide channel, quite a wide*
" *channel, so seemed to be. That is where I came over and*
" *camped. It seemed to be continuous.*
" Q—*Were you along the length of it?*
" A—*I remember I followed through when it was run-*
" *ning water—that channel.*
" Q—*You have been, I understand you; on every section*
" *of land that runs through at some time during the year,*
" *and have been down through?*
" A—*Yes, sir; when I used to travel all over. I lived*
966 " *on this side, on the east side. I know where the Tule*
" *House is; I have been there frequently.*
" Q—*Does this western channel run by that house?*
" A—*Yes, sir; it is right on the bank of the eastern*
" *channel.*
" Q—*Which bank of the eastern channel?*
" A—*The east bank; that is my recollection. I don't*
" *know what section it is on, no further than I see it on*
" *this map* (referring to the map). *It is on the map about*
" *where I should locate it.*
" Q—*What was the condition of the eastern channel*
967 " *where it runs through Township* 25 *South, Range* 22
" *East?*
" A—*Well, there is a perpendicular channel.*
" Q—*How far did that channel continue on, that open*
" *channel?*

" A—*I think it continued on to the lake. I have seen*
" *it to the lake, anyway, when the water was high?*"

T., II, fol. 963–7.

And on cross-examination:

" Q—*In places before reaching Tulare Lake, doesn't*
" *the channel pretty nearly play out?*
" A—*There is one side that is really better defined,*
" *to the lake, than a portion of the rest of the distance.*
" *That is the eastern channel. It is quite an open*
" *channel into the open waters of the lake, the eastern*
" *channel.*"

T., II, fol. 1006.

W. W. Hudson, in Government employ as herder, drove stock along Buena Vista Slough from 1859–60 to 1873, making several trips each way every years testified:

" Q—How was it about finding a running stream there
" usually or not?
" A—Well, sir, there was a current. It was very
" gentle in places, where the slough had cut down and
" was narrower, there was considerable current, where
" it had been spread out and the tules had grown up and
" it was dead water, or comparatively so,—yet there was
" a current. I last saw Buena Vista Slough between
" Buena Vista Lake and Tulare Lake in 1873, I think.
" Q—When you saw it last, was the general course of
190 " that slough, the water running through the same chan-
" nel as it was when you first saw it?
" A—Yes, sir.
" Q—There was no change?
" A—No, sir. No material change. The water was
" at the same points."

T., II, fol. 189–90.

R. B. Still, engaged in working with cattle on Buena Vista Slough from 1874 to the date of trial, and then nearly every year, in speaking of one of his trips to Buena Vista Slough, says:

"We struck the slough where it runs into Tulare
" Lake." (T., II, fol. 765).

And again:

770 " From the time
" I went there in 1874 up to the close of the year 1880,
" I should think I had crossed that slough a thousand
" times. I think I have crossed it on every quarter sec-
" tion on the swamp.
" Q—*I will ask you if in crossing that land you found a*
" *water channel all of the distance between Buena Vista*
" *and Tulare Lakes?*
" A—*Yes, sir.*"

T., II, fol. 770.

J. M. Lewis, employed by parties owning cattle that were on Buena Vista Slough, and on the slough during the years 1862–3–6 and 1871, and from 1876 to the date of the trial. He has been the most of the time on the slough between Goose Lake and Tulare Lake.

He says:

" I was working principally on the
" east side, between the head of Tulare Lake or Goose
" Lake, and the lower end of Weed Island.
" Q—*What has been the condition of the channel that*
" *runs along through the body of the swamp land of*
" *Buena Vista Slough, running aloug this body of swamp*
" *land, since you have known it, from Goose Lake to*
" *Tulare Lake?*
" A—*Generally it has been confined pretty well to the*
" *channel, all of the way down.*
1054 " Q—*What is about the average width of it?*
" A—*I suppose from* 80 *to* 150 *or* 200 *feet.*
" Q—*What was the average depth?*
" A—*I declare I could not tell you; perhaps it would*
" *be six feet, perhaps seven.*
" Q—*When the water has been running down that*
" *channel during the years that you have been there, in*
" *the channel, has there been any current?*
" A—*Yes, sir.*
" Q—*Which way was the current running or setting?*
" A—*Running north, towards Tulare Lake.*
1055 " Q—How far above Goose Lake have you been on
" that channel?
" A—Well, I have been as high as the Tracy crossing
" on the channel. I can hardly say how far I followed
" it up. I crossed it back and forth.
" Q—At how many different points have you crossed
" that channel above Goose Lake?

" A—Well, I declare I could not tell you the number
" of times I have crossed it. I have crossed it at a great
" many different points. *I have crossed it several thou-*
" *sand times, I presume. I presume at every section of*
" *land there is between Goose Lake and Tulare Lake, on*
" *every half section and quarter section.*
1056 " Q—What is the nature of the channel where you
" crossed it above and between Goose Lake and Weed
" Island or Tracy's Crossing?
" A—It seems to be mostly confined to the channel. I
" have noticed, wherever I have crossed it, that it seemed
" to be a deep channel, confined channel; it seemed to
" be a well defined channel where I crossed it.
" Q—*How many channels are there running there*
" *that would carry water between Goose Lake and Tu-*
" *lare Lake?*
" A—*There are two channels.*
1057 " Q—*Which is the larger one of the two, or main*
" *channel?*
" A—*I don't know which is the larger; I don't think*
" *there is a great deal of difference; if anything, I think*
" *the west side is a little larger, perhaps.*"

T., II, fol. 1053–7.

And on cross-examination he is particularly examined as to the channel from Tulare Lake up to Staten Corral, some 15 miles south of the lake, and he says:

" When I went to the slough I struck the
" slough at the southwest corner of Tulare Lake. I was
" there eight or ten days, or two weeks, working along
" up from there to Staten Slough. There was plenty of
" water there—swimming water any where that I noticed
" it or went into it. I went up as high as what we call
" the Staten Corral, some 15 miles from Tulare Lake.
" Q—During the whole 15 miles you say the water was
1071 " running a swimming current?
" A—It was wherever we struck it. I only crossed it
" one time; I was not in it but once, and that was in
" April, 1876. I only saw one channel at that time, and
" at that time I saw it once, and only once.
" Q—*Did you see the channel at any more than one*
" *place?*
" A—*Yes, sir.*
" Q—*How many places?*
" A—*I presume over* 100.
" Q—*What was the width of it?*

" A—50 *or* 200 *or* 250 *feet, perhaps. I don't know the*
1072 " *depth of it, except the place I went in; it swamped me*
" *and my horse. That is the only place I went in. It*
" *was running swiftly.*
" Q—Was there any place there that was spreading out
" all over the swamp land at that time?
" A—I did not see it. On the western side of it, it
" was not.
" Q—Was that all inside of the banks of the channel?
" A—On the western side it was; on the other side it
" was covered with tules. I don't know whether the
" water was there or not. I stayed there eight or ten
" days. I did not go back that year. I then went up to
1073 " Sacramento, and I stayed there perhaps a couple of
" months. I then came back to this place. When I came
" back again I struck the slough at the Tule House.
" Q--When?
" A—In September, 1876. Plenty of water then.
" About the same as it was before.
" Q—*How long did you stay there?*
" A—*I have been there off and on ever since.*"

T., II, fol. 1070-3.

Thomas L. Briggs, also on Buena Vista Slough with cattle in 1864-5, and from 1874 to the time of trial, except a single year of 1879, and was up and down the slough from Tracy's Crossing to Tulare Lake, says:

" Q—Now, Mr. Briggs, from the time you went on that
" slough in 1864, until this year, when you have been
" passing up and down the slough, crossing it, what
" have you found in that slough in the way of a channel
" to carry water?
1106 " A—*I found it a very well defined channel between*
" *Buena Vista Lake and Tulare Lake—that distance be-*
" *tween those two lakes.*
" Q—*Is there a channel defined there that would carry*
" *water?*
" A—*Yes, sir.*
" Q—*How deep is that channel upon the average?*
" A—*From four to twenty feet deep—various depths.*
" Q—*How wide?*
" A—*From twenty yards to one hundred yards, in*
" *places?*
" Q—*When you have been on that slough there, and*
1107 " *there has been water in the channel, has it been*
" *running?*

" A—*Yes, sir.*
" Q—*Has it had a current?*
" A—*Yes, sir.*
" Q—*In what direction?*
" A—*North.*
" Q—*Has this current always been in that direction?*
" A—*Yes, sir.*

T., II, fols. 1105–1107.

And being particularly questioned as to the slough north and south of the ~~Lake~~ Tule House, testifies:

" Q—*Can you start from the Tule House and follow the*
" *bed of that slough down to Tulare Lake?*
" *Defendant objects to the question as leading.*
" *Objection overruled.*
" A—*Yes, sir.*
" Q—*Can you follow that slough from the Tule House*
" *up to a point on Goose Lake, the head of it?*
" A—*Yes, sir.*
1144 " Q—How far can you follow the bed of that slough
" going south from a point west of Goose Lake?
" A—To Kern Lake.
" Q—To what lake?
" A—Buena Vista Lake."

T., II, fol. 1143–4.

JOHN BARKER, a stock raiser, who was on Buena Vista Slough in 1854–5–6–7–8 and 9, examining the channel with others to see if it was continuous from lake to lake, and who testified that every time he made the trip to Buena Vista Slough went its whole length from Tulare Lake to Buena Vista Lake. (T., II, fol. 329.)

He says:

" I next visited
" Buena Vista Slough in 1856; I went up there with
" W. F. Montgomery to look at the slough, to examine
" the water connection between the lakes.
" Q—Between what lakes?
" A—All of them: Tulare, Buena Vista and Kern.
" Q—Did you make such an examination, do you re-
" member?
" A—We did.
311 " Q—Go on and state in connection with that examin-
" ation between Tulare Lake first, and Buena Vista.

" A—Well, we went up there. I can explain the rea-
" son why I went up there, if you wish. I
" went up there with Mr. Mon'gomery. He went
" there on the representations I had made to him
" about the water connection, to examine it, and test
" the feasibility of the project of constructing a canal up
" there. We went there for that purpose, to examine
" the slough and connections between the lakes all of
312 " the way along.
" Q—What did you find the condition of things be-
" tween Tulare and Buena Vista Lakes? What did you
" find?
" A—We found water all the way along the slough be-
" tween the lakes.
" Q—Between Kern and Buena Vista Lakes?
" A—Yes, sir.
" Q—How deep was that water?
" A—I could not tell. At some places it was deeper
" than others.
" Q—Was it running at that time?
" A—Yes, sir.
313 " Q—In the channel?
" A—It appeared to be wherever we struck it. I could
" not tell whether it was all of the way along. It was
" after the Indian war occurred in 1856; it must have
" been the last of August or the first of September;
" somewhere along there. It was after the high water.
" Q—How many times do you suppose that you crossed
" that slough that you found there, in making this trip
" from Tulare to Buena Vista Lake?
" A—Well, we crossed it five or six times, I think. I
" don't know the exact number of times we crossed it;
" several times. When we crossed, we crossed on tule
314 " boats, we did not ford it at all. I don't know what
" portion of the swamp and overflowed land was covered
" with water at that time. The tules were about 16 feet
" high all around the margin of the slough. In a great
" many places where I went into the slough, we followed
" in the elk trails to get through, and in other places
where the mustangs had broken a trail in, to get to the
" water.
" Q—In following through there how wide did you find
" the stream of water?
" A—In following through there, between Tulare and
315 " Buena Vista Lakes—the first slough is the one I am
" speaking about. At the places where I saw it at that
" time I should think it must have been 30 or 40 yards

" wide. There was a current at the time, and it was set-
" ting down towards Tulare Lake. After getting up to
" Buena Vista Lake I went on to the channel between
" Buena Vista and Kern Lakes at that time. We found
" there a running stream of water going down there into
" Buena Vista Lake. At that time I went to the point
" where Buena Vista Slough leaves Buena Vista Lake."

T., II, fol. 310–315.

Referring to a trip made in 1857, he says:

" Q—What was the condition of Buena Vista Slough
" at that time, as compared with its condition when you
" were there in 1854, 1855 and 1856?
323 " A—Very similar. On that trip we did not cross
" Buena Vista Slough. We went on the connecting
" channel between Kern and Buena Vista Lakes. The
" condition of that channel was about the same we had
" seen it before. That was in the fall.
" Q—Was the water at that time running all the way
" from Buena Vista Lake to Tulare Lake?
" A—Yes, sir. That was in the fall of 1857."

T., II, fol. 322–3.

And again, as to 1858:

" I next visited the slough in 1858 and
" '59. The next time was in 1858. I was there upon
" a hunting expedition. I suppose I was there two or
324 " three weeks. It was in the summer time. I was with
" the same party of hunters I have spoken of before,
" hunting for Fort Miller. It must have been in July,
" 1858, I think. That was after the summer freshet had
" gone down.
" Q—Did you at that time cross the slough to and
" fro?
" A—Yes, sir.
" Q—How many times, do you suppose?
" A—Sometimes daily, almost; at different points all
" along the length of it.
325 " Q—What did you find the condition of it about that
" time?
" A—About the same as before.
" Q—How did you make your crossings?
" A—We made them on tule rafts.
" Q—*Yor found water flowing at that time from one*
" *lake to the other; Buena Vista Lake and Tulare Lake?*

" A—*Yes, sir.*
" Q—Was that channel the same as you found it the
" year before?
" A—I could not see any difference in it."
T., II, fol. 323–5.

It is not claimed by counsel for defendant that any of their witnesses ever crossed the swamp land at any point between Section 33, T. 26, S. R. 22 E.; and the crossing made by the witnesses just south of the Tule House, where they followed the channel that connects the east and west sloughs.

Only two of the parties sent out by the defendant went so far south as the Tule House. These parties consisted of:

1st. M. F. Taylor, Vining Barker, E. D. Cross and H. A. Jastro.

2d. M. F. Taylor, Walter James, J. D. Schuyler and J. G. Jackson.

The first party made their first crossing south of T. 26, S. R. 22 E., going to the Round Corral, which is on Section 3, T. 27, S. R. 22 E. (See Map "I.") (T., III, fol. 365.) Round Corral is on the high land east of the body of swamp land, through which the channel runs; and the Tule House is also east of the channels.

JASTRO says:

" Round
" Corral is on the east side of the swamp, probably 25
" miles from here or 27. We went from Round Corral to
366 " the tule shanty, *and in a straight line on the margin*
" *of the swamp.* We found no water; not the way we
" went.
" Q—*Did you cross any channel at all?*
" A—*No. You see we kept on the same side of the*
" *swamp going there.*"
T., III, fol. 365–6.

BARKER says:

"After reaching Round Corral, we went upon the
" east side of the swamp to the Tule House."

T., III, fol. 616–617.

The second crossing, or next crossing north of the Round Corral, they made was at the Tule House, and all the witnesses of defendant admit that at this crossing they both found and followed well defined sloughs.

The second party, consisting of Taylor, James, Schuyler and Jackson, also started from the Round Corral to go to the Tule House, and also kept to the east of the body of swamp land.

Schuyler says:

" On the 20th we started on that trip, going
" through the swamp, and got through on the 24th. We
" struck the swamp land district about Goose Lake. *We*
" *followed along the border of the swamp, and went into*
811 " *the interior, and to the Tule House*, and traveled about
" the swamp considerably.

T., IV, fol. 810–11.

" Then we followed along the margin of
" the whole dry bed of Goose Lake. The road fol-
" lows along the margin of the lake. From there we
" took a general northwesterly course, as I remember,
" along the margin of the swamp land, crossing a por-
" tion of it, and going into the interior of it to the Tule
" House."

T., IV, fol. 812.

James is asked to give the sections he passed through in going from Goose Lake to the Tule House, and he does so:

" Q—I will ask you to describe that trip that you took;
" and refer to the different points on those plaintiffs' maps
" numbers 2 and 3, and tell what you found. Starting out,
" show me on the map where you first struck the body of
" swamp land.
" A—I first struck the body of swamp land near Goose
" Lake, at the south end of Goose Lake on Section 29,
187 " Township 27 South, Range 23 East; and then went around
" Goose Lake northwesterly along the margin of the swamp
" and overflowed land through Sections 20 and 19 in the

"same township; then Sections 13, 14, 10 and 3 in Town-
"ship 27 South, Range 22 East; Sections 33, 28, 27, 22, 15,
"10 and 3 in Township 26 South, Range 22 East. I cannot
"say whereabouts on Section 3, but along the margin of
"the swamp and overflowed land.
"Mr. HOUGHTON—I understand this line run along the
"margin all the way?
"A—No, sir; it runs along the margin and crosses this
188 "point here. [Pointing on the map.]
"Q—Crosses at one point and then it continues on the
"margin?
"A—Yes, sir; we traveled then northward to the Tule
"House."

T., III, fol. 186–8.

All the sections referred to are either high land or on the east margin of the swamp land, and all are east of any channel that we ever claimed runs through the land. In fact, all of defendants' witnesses who made these trips say they kept on the east margin of the swamp land in going from Round Corral to the Tule House.

The second party, after going to the margin of Tulare Lake, return to the Tule House and follow the cross slough from the east channel to the west channel; they then follow the west channel south to Section 31, T. 26 S., R. 22 E., then cross in an almost due easterly course to Section 33, T. 26 S., R. 22 E., and went to Round Corral, on Section 3, T. 26 S., R. 22 E. [See testimony of James, T., III, fol. 209.]

On cross-examination we have Mr. James fix definitely this crossing from west to east, after the crossing from the Tule House to the west side:

"I think we went as far as the southwest
"corner of Section 31, T. 26, R. 22. I don't remem-
"ber that we found a cabin at that point. There were
"some corrals there; no water there; I think we crossed
"shomewhere about Section 30; from there we went to the
"east side of the swamp and overflowed land. In going
"across, we traveled a little south of east. I had an in-
"strument by which I fixed the course. I was not mak-
276 "ing all of these trips with the instrument. We started
"from about the southwest portion of Section 30.

" Q—And where would that bring you out on the other
" side?
" A—At some place in Section 33."
T., III, fols. 275–6.

All of defendants' witnesses having testified to finding a slough at the Tule House, and four of them testifying to have followed it a short distance south, until they came to the cross slough running across the swamp land and connecting with the slough on the west side, then all seven of them testifying to having made the crossing south of the Round Corral, or to Section 33, T. 26 S., R. 22 E., which is the section adjoining that upon which the Round Corral is situated, and all of them having religiously avoided examining or crossing the swamp land between Section 33, T. 26 S., R. 22 E., and the Tule House, where all of our witnesses had testified to there being two well defined and continuous channels, we desired to show, beyond question, that no witness of defendant had attempted to follow the east channel from the Tule House to Section 33, T. 26 S., R. 22 E., and that they knew nothing about it; so we questioned Mr. James in relation to the matter, and he testified:

" Q—To go back again, I understand, from the Tule
" House, you went off into the side slough which goes
" west. Where did you strike the slough which is rep-
" resented on this Map 3, and on the east side, again if
" at all, after leaving the Tule House?
" A—I don't know, sir.
" Q—You did not strike it at all?
283 " A—If we did, I didn't see it?
" Q—You did not follow that slough at all from the
" time you left it on the branch slough in Section 32, in
" a southerly direction?
" A—No, sir.
" Q—You know nothing about that?
" A—I know nothing about that; no, sir; except that
" when we passed over this point of land described, we
" could not see it.
" Q—*You have not described a trip through. The*
" *crossing you speak of is near where you met Section*
" 33?

284 " A—*Yes, sir.* WE MADE NO CROSSING THAT
" WOULD BRING US OUT ON THAT SLOUGH
" BETWEEN THE TULE HOUSE AND SECTION
" 33, TOWNSHIP 26, R. 22.
" Q—SO THAT YOU WERE NOT ON THIS
" SLOUGH AT ALL BETWEEN THESE POINTS?
" A—NO, SIR.

T., III, fols. 282–4

On cross-examination we also questioned Mr. Taylor, who had acted as guide for both of the parties making crossings from the Tule House and to the Round Corral, in relation to the examination of this east channel, between the Tule House and Section 33, T. 26, S., R. 22 E., and he also testified that he never was across the swamp land at any point north of Section 33 and south of where he left the slough, a short distance south of the Tule House, to follow the cross slough, to the slough or channel on the west side of the swamp land.

He testified:

" We followed from the
" Tule House, and drove along the slough; I crossed
" over in the course of that slough in that Section 13;
" we did not follow—
455 " Q—Did you follow up, or attempt to follow up, the
" slough running to the left?
" A—There was no slough; I just followed that slough
" as it ran. Where it came out, we were right here at
" this point.
" Q—You followed no slough along here as represent-
" ed on this map?
" A—No, sir.
" Q—And you know nothing about the country around
" there? (Pointing.) And you didn't go over it at all?
" A—*No, sir; I have never gone from the point marked*
456 " *Salt Slough to the point in* 33 *where I struck it when I*
" *went across that section; in crossing we came upon this*
" *side of it, and then crossed into these sections; I didn't go*
" *at all along the line represented by a slough here on*
" *Sec.* 33, *and the point where I left and crossed over to*
" *Sec.* 13."

T. III, fols. 454–6.

With four maps in evidence, all made from an actual meander survey of Buena Viste Slough, two made by defendant's surveyors, "H" and "I," two by Mr. McCray, "B" and "2," and all of them showing a continuous channel to the west line of Section 15, T. 30 S., R. 24 E., the testimony of three of defendant's witnesses, and the only witnesses sent by defendant to examine the slough from Wible's to the Bonestell House.

Macmurdo, T., IV, fol. 1275–6;
Crusoe, T., IV, fol. 210 and 229–30;
Fillebrown, T., IV, fol. 324–5 and 371;

to the effect that there is a well defined slough at the Crocker or Norton house, where this break occurs in Section 15 on Exhibit "A," and the testimony of the numerous witnesses of plaintiff to the fact that there was a well defined slough, with good banks, to the "drift pile," a point from two to thiee miles north of the Norton house, we do not think this Court is going to declare that the finding that there is a break in Buena Vista Slough, on Section 15, T. 30 S., R. 24 E., is supported by the evidence, or that there is a substantial conflict in the evidence as to the existence of a channel at the Norton House by reason of the fact that Map "D" shows a break in the slough, caused by writing the words: "Gate. Beginning of side canal," through it on Section 15, and the further fact that Mr. Souther says:

680

" When the water was turned through the headgate, a
" few rods above the camp, into this slough, into Buena
" Vista Slough, it ran down in here somewhere. *I*
" *never was there, from the fact that there was so much*
" *water there. I could not get by it.* I went down to
" the west side to the west bank. It was not all the way
" down. But the bank was low there, and it threw it out
" here. The water came in here to the bank of the canal.
" I threw the water right up against the east bank of the
" canal. It flowed down in here through that break in

the slough there where McCray left the break in the
" slough; the depression there was low to the east. That
" is in Section 15, Section 14. It must be 15, in Town-
" ship 30, Range 24. The water that came up here to
" the east flowed back in this depression, until it struck
" the east line of canal in Section 11. Then it flowed
" down all over that country there, from there clear to
681 " the slough. There was so much water that I tried
" several times to get through there, and usually failed to
" get through. Once or twice I made it through there.
" The whole country was inundated there; all through
" that portion there down to 3, and into Section 3."

T., III, fol. 679-681.

By turning back to folio 673, it will be seen that Mr. Souther was not referring to any breaks in Section 15, but to the head of the "Central Cut," on Section 32, some two miles north of Section 15.

He says:

" A—The design of that cut was to convey the
" waters across the flat. *In the slough there was a*
" *break; a place wide and flat.* There was no
" slough to amount to anything. I designed running
" this water to my canal, which I did. I made a road-
" way, and on either side of that roadway I had a canal
" to conduct the water down along these lands, to throw
" it on the lands or off the lands.
" Q—*Could the water run through the slough at that*
" *point?*
" A—*Well, it spread. The water, when it got to this*
" *point, the water spread all over the country.*
674 " Q—*What point is that?*
" A—*This upper point of this cut marked "Central*
" *Cut," that terminated on the line between Sec.* 3 *and* 4,
" *and ran down to the northeast corner of Sec.* 5. *When*
" *the water flowed down this slough here—this crooked*
" *slough here, as you see marked on the map and got to*
" *that point, that is, the southeast point of the central*
" *cut, as marked on Map D, it spread to the south.* The
" water came from off here, a large portion of it. Some
" of it went along down there through this land, appar-
" ently right in here. (Pointing on Map D). It was
675 " right in the flat slough or channel there, as marked.
" Though that slough or channel had banks principally on
" the north side, if I remember right, there was very

"little bank, if any. In places there was a small bank
"on the south. But generally it flattened out to the south,
"and that being lower caused the water to run off here
"and flow down that south line. *The water would over-*
"*flow to the south of that point.*"

T., III, fol. 673–5.

It clearly appears that Mr. Souther is referring to the point where "Central Cut" is marked on Map D when he refers to a break left in the slough by Mr. McCray; this is the very point where all of plaintiffs' witnesses locate the "drift pile," which they say filled up the channel of the slough and forced the water out, making three channels. Epperly says this "drift pile" was about one and one-half miles north of the Norton House. (T., II, fol. 2196.) But if we admit that he, in his rambling testimony, refers to Section 15, then we have his testimony against that of at least twenty witnesses, four of them put on the stand by defendant, and four maps, all showing a continuous slough through Section 15, and we insist that this does not make a *substantial conflict* in the evidence; and if he did refer to the gap in the slough on Section 15, where the words "Beginning of Side Canal" are written through it, still this evidence will not justify the finding that Exhibit A is correct, as the gap appearing on Section 15, on Map D, does not appear on Exhibit A at all, but on the contrary, a well defined channel is depicted on Exnibit A, where the gap appears on Map D. Your Honors must take into consideration the fact that Mr. Souther is testifying to a country he knew nothing about, while all the other witnesses who testified to this slough being continuous through Section 15, were surveyors, who had made meander surveys of it, or were men whose occupation, extending over a period of from five to twenty years, had made them familiar with every acre of the swamp land, and with the channels running through it.

We leave out of consideration the testimony of Van Doran, Stoner and J. S. Ellis, as the crossing (De Webber road) they describe was on Section 30, T. 29 S., R. 24 E., or at least five miles lower down the slough (see Map "D.") Counsel for defendant do not rely upon the testimony of the two last named witnesses, and on Exhibit "A," annexed to the findings, no break appears in the channel on Section 30, T. 29 S., R. 24 E., where it is crossed by the DeWebber road.

Even Macmurdo says there is a well defined slough, with good banks, through Section 30, T. 29 S., R. 24 E., and Section 25, T. 29 S., R. 23 E.,

T., IV., fol. 1076,

and that it would average 50 or 60 feet wide from the south line of Section 32 until it reaches near the road which crosses on Section 24.

Fol. 1081.

He says the DeWebber road is correctly delineated ("dotted") on Map "D.,"

Fol. 1144,

and Macmurdo says he measured the slough at the DeWebber crossing, in 1880, and found about 1½ or 2 feet of water running in it, and the banks about 3 or 4 feet high.

Fol. 1271.

Counsel for defendant fully realize the fact that if we can show to this Court, that Exhibit A, is not correct in showing a break in Buena Vista Slough, just south of plaintiffs' most southerly line, that the judgment in this case must be reversed. Exhibit A has delineated on it a well defined channel to this break, and also a well defined channel from this break to the Bonestell House, on Section 24, T. 29 S., R. 23 E., and it runs through two sections of land described in the amended complaint, after passing Section 15 and

before it reaches the Bonestell House, i. e. Sections 10 and 5, T. 30 S., R. 24 E.

This Court is furnished with no information as to the length of this alleged break, other than that it can obtain by an estimate by placing a scale on Exhibit A, annexed to the findings and on Exhibit D. It is certainly a remarkable fact that no witness should be questioned by defendants' counsel in the lower Court upon a point that they now claim is the turning point in this case.

Hardly a witness who was at all familiar with Buena Vista Slough was called, who was not shown this map "D" by defendants' counsel, but not one of them was asked the question as to whether or not there was a break in Buena Vista Slough on Section 15, where a gap appeared in the channel. If we place a scale on Exhibit A, which is on a scale of half an inch to a mile, we shall find this gap to be about three-sixteenths of a mile, or 990 feet. Placing the scale on map D, the same result is reached. But this Court will see that the breaks are not located on the two maps at the same point. On Map D the gap is in the body of Section 15, the channel appearing again after the gap, and running about a quarter of a mile before it reaches the north line of Section 15, while on Exhibit A the gap is in the extreme northerly portion of Section 15, and the channel only appears again from the north line of Section 15, and not in Section 15 at all.

The position that counsel for defendant must take when they claim that this finding that finds that Buena Vista Slough, *is fully and correctly delineated on* Exhibit A, is supported by Map D is this: that as a gap or break of some 990 feet in length, appears on the north half of Section 15, that the finding is correct, although it places that gap or break at an entirely different point than that at which it appeared on Map D, as the

gap or break as delineated on Exhibit A is of the same length and is on the north half of the same Section. That is, that this gap or break can be "floated" by defendant and placed "where it will do most good."

Where on Exhibit "A" can be found the channel on the west side of the body of swamp land running through the north line of Plaintiff's land and into Tulare Lake?

James, Jackson, Taylor and Schuyler were the only witnesses sent by defendant to the margin of Tulare Lake; three of them find a slough from three to four miles long running through and out of plaintiff's lands, in Tp. 25 S., R. 21 and 22 E., and beyond the south margin of Tulare Lake.

Mr. McCray finds this slough (Mud), plats it on his map 3, showing that it runs into a lagoon after passing through Section 2, Tp. 25 S., R. 21 E.

James says he found this slough delineated on Map 3.

" From there we traveled easterly.
" We saw some cattle at some distance to the east, and we
" went to where the cattle were, and there found a slough.
195 " I should judge it was about Section 2, Township 25
" South, Range 21 East. We found a large slough, with
" some water in it—standing water. From the point
" where we started to go eastward to the point where we
" found this slough we had found no channel, and it was
" level, even tule land. *At Section* 2 *the channel, I*
" *should think, was* 100 *feet wide and* 8 *or* 10 *feet deep.*
" *I followed that channel northward a mile or such a mat-*
" *ter. I followed it to its end.* At its end is flat, even
" land. We then went some distance further north, beyond
" the end of this channel, and found unbroken tule country,
196 " but no channel. Then we came back to the point where
" we had first struck this slough, on Sec. 2, and followed
" it back. We came back on the east side of the slough.
" In following towards Tulare Lake we were on the west
" side; coming back we came back on the east side. In
" going north and coming back south we crossed no branch
" or channel. The general appearance of the country was

"flat—tule land. Having got back to the point where we
"first crossed the slough, we started to follow the slough
"northward. *We then followed up the slough on the*
"*east side of it, from Section* 2 *to Sections* 12 *and* 13.
"*About a mile and a half or two miles from this point on*
"*Section* 2 *the slough disappeared*, at the southern end.
"It cannot be traced any further."

T., III, fol. 194-7.

And at folio 269, on cross-examination, he says Mud Slough, marked on Map 3, on Section 2, in T. 25 S., R. 21 E., was the slough he found.

JACKSON found this slough. He says:

"We went in an easterly course. We saw
"some cattle in that direction, and thought possibly there
"would be, naturally, some water where they were. We
"went over in that course. After passing the general
"line of where the cattle were we crossed and went a
"little further east and struck a slough there.
"Q—What sort of a slough was it?
"A—*It was probably* 50 *or* 60 *feet wide*, with standing
"water. We followed that to the end of it, in a north-
"erly direction. We were on the west side of it. *We*
"*followed it, possibly a mile or a mile and a half, north-*
"*erly.*
"Q—Did you come to the end of it?
"A—Yes, sir; come to where it ran out in a kind of
"—, made a pond or a lake. We drove across it to
"see if there was any outlet to it anywhere."

T., IV, fol. 481-2.

"We crossed around the pond and hunted
"until we got back to where the slough ended in a pond.
"We followed up the east side of that slough—followed
"south on the east side of that slough.
"Q—Did you see the place where you had been follow-
"ing it on the west side; could you see across?
"A—Yes, sir.
"Q—You could see across it there?
"A—Yes, sir.
"Q—*How far did you follow it on the east side?*
"A—*I should judge, about two miles*, until it termi-
"nated. We followed it until it terminated.
"Q—Did you see any inlet or outlet or branches, or
"any other slough there?

" A—No, sir; there was water in that, but it was
" standing water. *The banks probably varied from six*
" *to eight feet in depth in places, and down to noth-*
" *ing.*
" Q—*How wide was it?*
" A—*Well, in places, forty to sixty feet.*
" Q—Then you came to the end of it on the east side.
" Now from the pond, following along the east side, what
" direction were you going?
" A—We were going in a southeasterly direction."

J IV fol 484-5

TAYLOR also found this slough. He says:

" After going to that
414 " Sec. 16, as near as I can locate it by the distance, we
" struck then north up into some of these sections (show-
" ing on Map 3), and beyond the limit of Map 3. After
" getting outside there I turned almost east, and came
" across somewhere, to a slough with water in it, and cattle
" feeding on the banks, which at first attracted my atten-
" tion. Off to the east about a mile and a half from where I
" turned, *we found a slough there that I suppose was* 60
" *or* 70 *feet wide, and two or three feet deep,* with stand-
" ing water in it at places. After striking that, we followed
" that slough then up to the north on the west bank. *After*
" *following it, I suppose a mile, we came to what seemed*
415 " *to be a lake bed.* There was no vegetation in it, it was
" perfectly flat. Probably that was a quarter of a section
" of land there. Between the point where we struck it and
" the lake bed, there no branch sloughs were running into
" or out of it. The general appearance of the country was
" flat, and grown over with tules. After reaching the lake
" bed I turned west from the mouth of the channel we had
" been following down, and drove entirely around the lake.
" In making this circle, I could see no outlet at all. There
" was no break in the tules. It seemed to be an impeni-
" trable mass of tules.
416 " Q—IS THAT LAKE DESIGNATED ON THE
" MAP ABOUT THE POSITION? [Referring to
" map 3.]
A—YES, SIR: AND MARKED 'LAGUNA,' NEAR
" SEC. 2, T. 25, R. 21. THAT IS AS NEAR AS I
" CAN TELL ABOUT IT. I THINK THAT IS THE
" PLACE.
" Q—There a couple of outlets marked on the map.
" Did you find any?
" A—No, sir. If they were there they were covered
" up with tules so that I could not see them. After going

417 " around the lake, we came back to the entrance to this
" slough on the east side, and followed the slough up; and
" it seemed to me that we were traveling south almost en-
" tirely. We followed the slough up from the lake bed I
" have described, about three-quarters of a mile, I think,
" before the water ceased entirely. There was water in the
" slough in little places, but it was not a continuous water
" channel. But you could come to water, and then a little
" break in it, and then you would come to some more water.
" *We followed it up three-quarters of a mile, I think. We*
" *continued up the west side of the slough for two miles,*
" *going southward.* We may have been going a little east
418 " of south, but in a southerly direction. There it had just
" no beginning at all; it just drove right out into the tules
" and you could find nothing further of it. It disappeared
" entirely. *In going along this slough from the lake, we*
" *followed right up the slough, and we could see the west*
" *bank of the slough. We could see it all the way*
" *after we got above the water. We drove in the middle*
" *of the slough.* JT fol 414-418.

SCHUYLER, who went with Taylor on this trip, is not examined in relation to this slough.

The other witnesses find a slough corresponding with that laid down on McCray's Map 3, running into a lake, pond or lagoon, which is in the bed of Tulare Lake (see Exhibit "A," annexed to the findings, and diagram "I" in defendant's brief) some three or four miles long and from 60 to 100 feet wide, and every foot of that slough running through plaintiffs' land, the lagoon being on Section 35, T. 24 S., R. 21 E., just north of plaintiffs' north line. (See Map 3.)

Still, on Exhibit "A," upon which the Court finds that "THE CHANNELS OF KERN RIVER AND "THE SLOUGH * * * * ARE CORRECTLY "AND FULLY SHOWN AND DELINEATED," not a trace of this channel can be found.

No other witness called by defendant testified in relation to Buena Vista Slough at that point except Mr. Murray, who said, speaking of his first trip to Tulare Lake when he first brought cattle there in 1864:

"I brought cattle here first in 1864. It was a very dry "year, the most part of it. It was a year of great drought. "I came here from Tulare and brought cattle with me, "somewhere in the neighborhood of a thousand or twelve "hundred. I was with them. I bought those from a man "who had them at the head of Tulare Lake and in the "swamp--*the south end of Tulare Lake, where Buena "Vista Slough goes into it.*"

T., IV, fol. 1497.

We have the testimony of some twenty witnesses, all swearing that there is a well defined slough at the Tule House, and that it runs north and south of that house for miles, and that on the west side of the swamp land, west of the Tule House, there is a channel from four to six miles long, and *not a single witness testifying to the contrary*, except H. A. Jastro, who is asked the—

"Q—Did your find any *indication* of a channel at "the Tule House?
"A—No, sir."

T., III, fol. 366.

[But he testified that there was a channel on the west side of the swamp land three miles long. (Fol. 367.)] And the uncontradicted testimony of three of defendants' witnesses—James, Jackson and Taylor—to say nothing of the corroborating testimony given by plaintiffs' numerous witnesses, that there is a well defined slough or channel, at least three miles long, running through plaintiffs' land, and across his north line and into Tulare Lake.

With all this testimony before it, the Superior Court finds that the channels of Kern River and the slough in the complaint mentioned (Buena Vista Slough), "*are correctly and fully shown and delineated*" on the map annexed to the findings and marked Exhibit "A." Still on that map no trace of a channel appears at the Tule House or north of it, nor for some twenty-five miles south of it.

If this Court refuses to disturb this finding, on the ground that there is a substantial conflict in the testimony as to the existence of this slough, it will be because Mr. Jastro testifies that there is *no indication of a channel* at the Tule House, although six of the defendant's witnesses testify that at that point there is a well defined channel, from 100 to 250 feet wide, and from 8 to 12 feet deep, and when all of plaintiff's witnesses testify to the existence of such channel.

The position of defendant's counsel is:

a. Souther testified that at the point where Buena Vista Slough entered plaintiff's lands on the south, the channel was not well defined, and that when a large head of water was running in Buena Vista Slough, it would overflow at that point and spread all over the country.

All of the other witnesses of defendant who testified as to the condition of the slough at that point, including engineers, who had made meander surveys of the slough at that point, represent the slough to be well defined at that point, and in this they agree with plaintiff's numerous witnesses.

That this testimony of Mr. Souther creates a substantial conflict, and the Court will not disturb the finding.

b. Mr. Jastro testifies that at the Tule House, where Buena Vista Slough leaves plaintiff's lands, there is no *indication* of a channel.

Six witnesses of defendant testify that there is at that point a well defined channel, and that it runs both north and south from the Tule House for miles, and at least a dozen witnesses called by plaintiff testify to the same effect.

That this testimony of Mr. Jastro creates a *substantial conflict*, and the Court will not disturb this finding.

We respectfully submit that there is no *substantial* conflict in the evidence as to the existence of this slough or channel, and as to its continuity from Buena Vista Lake to Sec. 24, T. 29 S, R. 23 E, and for miles both north and south of the Tule House, and on both sides of the swamp land, and that the evidence given cannot be safely relied upon as the basis of the 18th finding, nor can that finding be upheld under the rule and adopted by this Court in respect to findings when there is a substantial conflict in the evidence.

Branson v. *Carothers*, 49 Cal., 382;
Guerrero v. *Ballerino* 48 Cal., 121.

A correct statement of the rule will be found in
Hayne on New Trial and Appeal, Vol. 2, § 288, p. 865–6.

" From a careful examination of all the cases, and " from the consideration above suggested, it is believed " that the following is a correct statement of the rule, " viz: that where there is a substantial conflict in the " evidence, the Supreme Court will not disturb the " verdict or other decision of fact, although it may be " against the weight of evidence; *but that, if it appear* " *to a reasonable certainty that the verdict or decision* " *was wrong, upon the evidence, it will be set aside,* " *although there be direct testimony in its support.*"

In this case it not only appears to a *reasonable* certainty that the decision is wrong, upon the evidence, but to an *absolute* certainty. Two cases recently decided by the Superior Court of Utah also clearly state the rule governing Courts in such cases.

"In the case of *Harrington et al* v. *Chambers et al*, " (1 W. C. Rep. 63), decided at this term, we an- " nounced as the settled doctrine of this Court ' that " the findings of the trial Court will not be disturbed, " unless the preponderance of evidence is so apparent

"and marked that the appellate Court has no hesi-
"tancy in declaring that the particular finding under
"review is against the evidence." In the case at bar, the preponderance is so great and decided that we have not the slightest hesitancy in declaring that this particular finding is against the evidence. It requires no nice weighing and balancing of the testimony to arrive at the conclusion.

Chamberlain v. *Raymond*, 1 W. C., Rep. 5231.

As to the channel, "Mud Slough," that appears on Map "3," no witness testified in relation to the country through which it passed, without describing it fully, and giving its size from 60 to 100 feet wide, and from two to ten feet deep; and they all say it extends north beyond the margin of Tulare Lake. Here, at least, there is no substantial conflict in the evidence, but every witness testified that this channel exists, and extends into Tulare Lake. Still, on Exhibit "A" cannot be found a trace of this slough or channle.

IV.

BUENA VISTA SLOUGH, FROM BUENA VISTA LAKE TO TULARE LAKE.

We claim further, that there is a continuous channel from Buena Vista Lake to Tulare Lake.

We shall content ourselves by calling the attention of this Court to the testimony of the numerous witnesses who testified to the existence of a continuous channel from lake to lake.

We first call attention to plaintiffs' Exhibits "2" and "3," made by Mr. McCray from a meander survey made in part in 1877–8, and in part in 1881. These maps show a continuous channel from where the middle branch of Kern River enters Buena Vista Slough, to Tulare Lake. It is a duplicate of defendant's Map

"I," as regards the channel from Buena Vista Slough to Section 24, T. 29 S., R. 23 E., or a distance of about thirty-five miles.

Commencing on p. 405 of Vol. 2 of Transcript, Mr. McCray gives the field notes of his meander survey of Buena Vista Slough, as delineated on Map "3," and also the width and depth of both the east and west channels at from one to five points, on nearly every section through which it passes.

Mr. F. A. Tracy, who lived on or near Buena Vista Slough from 1863 to 1878 or '9, owned land on it, and was running his cattle all the distance between Buena Vista and Tulare Lakes, describes the channel of Buena Vista Slough by townships.

See pages 230 to 242, Vol. II, Transcript, inclusive.

And the most of his testimony, from pp. 230 to 260, is devoted to describing the Buena Vista Slough country and his experience there with stock for a great number of years.

Mr. F. M. Epperly, who has lived on the banks of Buena Vista Slough since May, 1871, except for a single year, describes the channel of Buena Vista Slough, from Buena Vista to Tulare Lakes, by sections (pp. 547 to 556, Vol. II, Transcript), giving average width and depth in each township; and the whole testimony of this witness, from p. 543 to 557, is devoted to describing Buena Vista Slough as a water channel, and the volume of water carried, since 1871.

Mr. J. C. Crocker also describes the channel of Buena Vista Slough, from lake to lake, and gives a clear and extended account of an experience of some twelve years, from 1869 to 1881, on the swamp land along Buena Vista Slough, where he was during all that time engaged in raising cattle.

We also have the testimony of other witnesses called

by plaintiff, who had been engaged in raising, or with stock, on Buena Vista Slough, from five to twenty years, all to the effect that there was a continuous channel from Buena Vista to Tulare Lakes.

R. B. Still, T., II, p. 190, 193 and 200;
J. M. Lewis, T., II, p. 261 to 272;
F. S. Briggs, T., II, p 273 to 287;
C. W. Clarke, T., II, p. 287 to 296;
Geo. Racine, T., II, p. 309 to 316;
Jesse Dover, T., II, p. 316 to 318;
Milton Rogers, T., II, p. 322 to 329;
T. W. Barnes, T., II, p. 329 to 346;
Milton Norton, T., II, p. 418 to 434;
Robert Burgan, T., II, p. 434 to 437;
W. W. Hudson, T., II, p. 45 to 55.

Also the testimony of S. W. WIBLE, who has resided on Section 15, T. 30 S., R. 24 E., on the bank of Buena Vista Slough, since 1876, and who had during all the time been engaged in business that made him thoroughly familiar with all the channels that ran through the swamp land, extending from his house to Tulare Lake.

Also the testimony of John Barker, who had examined the watercourse from lake to lake repeatedly, to ascertain and report upon the condition of Buena Vista Slough as a continuous water channel.

All of the above-mentioned witnesses testify that there is a continuous channel from Buena Vista Lake to Tulare Lake.

Nearly every one of the witnesses above named was examined solely as to this channel, and the tract of swamp and overflowed land through which it ran. They were, as a rule, witnesses in no manner connected with the plaintiffs, and were by reason of years of experience

in following occupations that took them to this country every year, and led them along Buena Vista Slough from lake to lake, qualified to testify as to the condition of Buena Vista Slough at all seasons of the year.

Counsel for defendants, in their brief, refer to plaintiffs' witnesses in a manner that is to say the least, lacking in dignity, and use terms better calculated to be addressed to a Justice of the Peace, than to this Court. They say: "most of these witnesses, as your Honors will see, were 'hog men' or 'cattle herders.'" (Page 141.)

All of the witnesses of plaintiffs were owners of stock or land on Buena Vista Slough or of both. Five or six of them had resided on the slough for years in business for themselves, and those who were employees and sent to Buena Vista Slough in connection with such employment, were not employed and sent solely to qualify themselves to be witnesses in this case, but were on and along the channel for years before this suit was thought of, and engaged in the only occupations that could place them in possession of knowledge that would enable them to testify intelligently in this case.

We have also the testimony of Professor George Davidson, who described the source of Kern River and its course to Buena Vista Slough.

He then says:

"Q--Now, after Kern River has discharged itself in the
"way you have described and the course you have de-
"scribed, to Buena Vista Slough, what is the next course
"those waters take—the next general course?
"A—After entering Buena Vista Slough its general
"course is to the north northwest.
"Q—How in the direction of Tulare Lake?
"A—In the line of the course of depressions of the
"valley of California, through Tulare Lake."

T., II, fol. 1475.

He then testifies as to the result of two measurements of the water running from Kern River into Buena Vista Slough, to show how much was running south into Buena Vista Lake, and how much north down Buena Vista Slough towards Tulare Lake. He says 400 cubic feet per second was running south into Buena Vista Lake, and 300 cubic feet per second was running northward. (T., II, fol. 1480).

He says:

1484

" Q—When Kern and Buena Vista Lakes are filled by
" this flow of water from Kern River, through Buena Vista
" Slough, filled to have full banks, where will the water
" then flow?
" A—The water will then flow to the north northwest,
" and if there was a supply it would increase the height.
" But if the supply north was decreased, it would then
" afford the means of draining the lakes and all go to the
" north-northwest.
" Q—*Is there any other outlet there that you know of*
" *except to the north-northwest from Buena Vista Slough?*
" A—*No, sir.*

1485

" Q—What is the grade from Buena Vista Lake to
" Tulare Lake, Professor?
" A—Nearly 100 feet. You mean by the grade, the dif-
" ference of levels? The width of the valley, where the
" Kern River comes into it, between the Coast Range and
" the foot of the Sierra Nevadas, is about thirty-six or
" forty miles in round numbers. The flow of water
" from this Kern River Valley is west southwest until it
" reaches these two lakes or connecting streams, then the
" flow of water is north northwest.

1486

" Q—Do you know of any other source of supply that
" the Kern and Buena Vista Lakes have other than Kern
" River?
" A—I do not. That is, in wet seasons there might be
" a small amount supplied from the San Emidio Cañon,
" from Tejon Cañon and from the Tehachepe. That
" would be when there is a large flow. When we passed
" through the San Emidio Cañon in 1873, we crossed no
" sign of water at all. The distance from Buena Vista
" Lake to Tulare Lake is about 52 or 3 miles in a straight
" line."

T., II, fol. 1483–6.

The testimony of Professor Davidson as to the difference of elevation between Buena Vista and Tulare Lakes is afterwards stricken out (T. II, fol. 1488); but Mr. Wible gives the difference in elevation of the two lakes as 82½ feet. (T., II, fol. 1833).

Also the testimony of Col. Mendell, called by defendant. He testified that he measured the flow of water in Buena Vista Slough, that entered it from Kern River, on two occasions.

He says:

" I have seen the water divide
" and go in the two directions; that is a short distance be-
" low that Cole Bridge; about where the river empties into
" Buena Vista Slough."

T., III, fol. 985.

(This was April 17, 1881).

T., III, fol. 1016.

" Q—Have you ever made any measurements of the
" waters there which divide those going north and those
" going south?
" A—Yes, sir; I did on two occasions; once about three
" weeks ago and once some days later.
" Q—Where were those measurements made?
" A—One measurement was made in the slough to the
" south of Cole's Bridge, between that and Buena Vista
991 " Lake; I suppose one-third or half a mile below the
" the bridge, between the bridge and the lake. The other
" one was made at the ford.
" Mr. McAllister. You say a measurement made south
" of the Cole's Bridge one-third of a mile below; you
" mean above, don't you?
" A—Any way you please to take it; sometimes it is
" below, sometimes above; I mean between the bridge
" and the lake.
" Mr. Haggin. Q—Do you term that above or below?
" A—When the water was running into the lake I would
992 " term it below; if the water was running out of the lake
" I would term it above, in that sense, in regard to the
" running of the water; I don't mean by that term to con-
" vey any impression in regard to that; it is between the
" bridge and the lake; the water was running into the

"lake at that time, so that it was below in that sense;
"the other place was at the ford, where the road crosses
"it; I should think two or three miles by the time we
"were driving it, to the northwest of the point just re-
"ferred to; at the last ford the water was running north
"and at the first point it was running in a southerly di-
993 "rection.
"Mr. HAGGIN. When you first made those measure-
"ments, what amount of water did you find running south
"to the lake, at this point you mentioned?
"A—I found about 370 cubic feet per second.
"Q—And what amount did you find at the ford to the
"north?
"A—Just about half that, almost exactly half of it;
"that would be 185 cubic feet per second; that was on
"the first occasion."

T., III, fol. 990–3.

He again measured the flow of water in Buena Vista Slough, April 30th.

He says:

"A—Going north, I measured at the ford there, going
"to the north, 438 cubic feet per second, and going to
"the south, 567 feet.
"Q—That was the measurement to the north of the
"bridge?
"A—The first one, the measurement I gaveyou, was to
"the north of the bridge, and the second one was to the
"south of the bridge; that is, the first was the measure-
"ment going north, which was running north, and the
"other was the measurement of the water which was run-
1019 "ning south; the amount going south to the lakes was
"567 feet; the amount going north was 438 feet.
"Q—When you took the measurements to the north of
"the bridge, you found so many feet of water running
"northward, I understand you?
"A—Yes, sir.
"Q—Well, does that embrace all the water at that
point?
"A—The measurement of the water which was going
"to the north was made a mile or two north of Cole's
"Bridge; there is a ford going across there a little over
"two miles north of the bridge; all the water at that
1020 "place was running north. At the measurement that
"I made south of Cole's Bridge all the water there was
"running south, and the sum of those two made the
"amount of water running there.

"Q—Can you state whether those measurements were "measurements of the total amount of water that was "running in New river, or the total amount of water dis- "charging from New river into Buena Vista Slough from "the various forks of New river?

"A—Well, I suppose it to be the sum of those two, "sir; I added together those two; that is the best prac- "tical method of ascertaining what there is down there 1029 "running at the mouth of New river; it would be to "take those two places, find convenient places to guage "them, and add them together.

"Q—There seems to be considerable difference be- "tween your measurements—the first measurement and "the last one?

"A—Yes, sir; the river was much higher; there is "also considerable difference in the proportion.

"Q—Is there any explanation of that that occurs to "you?

1022 "A—No, sir; it is a fact, that is all."

T., III, fol. 1018-1022.

This witness says that at the time he made the first measurement on Buena Vista Slough, April 17, and found 370 feet going into the lakes and 185 feet going north (555 feet in all), he measured the flow in New River at the Pioneer Bridge and found nearly 630 feet per second, and on the 30th of April, about 1000 feet per second at the Pioneer Bridge. On that day 567 feet were running into the lakes and 438 northwest along Buena Vista Slough, or 1005 feet in all (T., III, fol. 1027), showing that there was no perceptible loss of water from the Pioneer Bridge to Buena Vista Slough, a distance of some fifteen miles, and run there two-thirds the distance between the head of the Calloway Canal and Buena Vista Slough.

And then we have the testimony of their own witnesses to the almost constant flow of a large volume of water in Old and New River from 1866 to 1877.

Testimony of J. R. Watson (T., III, fol. 1269);
Testimony of S. A. Burnap (T., III, fol. 1287 to 1292);

Testimony of J. Neideraur (T., III, fol. 1310 to 1315);
Testimony of R. Meacham (T., III, fol. 1323);
Testimony of C. Christensen (T., III, fols. 1359-60);
Testimony of A. C. Maude (T., III, fol. 1634);
Testimony of W. Canfield (T.; III, fol. 1684;)
Testimony of S. H. Anderson (T., III, fols. 1732-5).

THIS COURT WILL TAKE JUDICIAL NOTICE OF THE SOURCE AND COURSE OF KERN RIVER.

The fact that the immense quantity of water that comes annually down Kern River, if left in its natural channel, would find, and has always found, its way to Tulare Lake; or in other words, that Kern River empties into Tulare Lake, is a fact that the Courts take judicial notice of, as one of the prominent geographical features of the country, such as lakes, rivers and mountains, and as a part of the common public history of this State. This Court will take notice that Kern River is one of the largest rivers in California.

Winnipeseogee Lake Co. v. *Young*, 40 N. H., 430;
Neaderhauser v. *The State*, 28 Ind., 267;
Cash v. *Auditor of Clark Co.*, 7 Ind., 229;

Courts take judicial notice of the geographical position of rivers.

City Council of Montgomery Co., v. *M. & W. Plank Road Co.*, 31 Ala., 87;
Whitney v. *Gamb*, 11 La. Ann., 433.

If there is not sufficient proof as to the course of Kern River, and where it emptied, the Court should have taken judicial notice of such fact.

Brumagin v. *Bradshaw*, 39 Cal., 40;
People v. *Smith*, 1 Cal., 13.

Courts take judicial notice of whatever ought to be generally known within the limits of its jurisdiction.

1 Greenl. Ev., § 6.

What school-boy in this State, if asked where Kern River rises and into what it empties, would not answer: It rises in the upper Sierras and empties into Tulare Lake. Or, if asked what rivers empty into and form Tulare Lake, would not included Kern River as one contributing to the formation of that body of water. Should the Court be not so well informed, all it need do is to resort to any map of the State of California for the information. Not a single map in this State that we have ever seen but has this watercourse delineated on it. We especially refer to the very elaborate map of the Southern and Pacific Coast States, compiled from explorations and surveys made by Lieut. G. K. Warren, Topographical Engineer; Brev. Maj. W. H. Emory, Topographical Engineer, in 1854; Capt. A. A. Humphreys, Topographical Engineer, in 1854–'58, and issued by the War Department in 1868.

If the fact that Kern River or Buena Vista Slough ran through and formed a body of swamp land, deprived it of its character as a watercourse, then the Sacramento River, San Joaquin River, Napa River, King's River, and all other rivers emptying into Tulare Lake or the Bay of San Francisco, are not watercourses.

We have, if the findings in this case be true, a river running at least 2500 cubic feet of water per second, with no outlet for its waters, except two little lakes of such size that they would be filled by a month's flow of the river.

EVIDENCE OFFERED BY DEFENDANTS TO SUSTAIN THE FINDING THAT BUENA VISTA SLOUGH IS NOT A CONTINUOUS CHANNEL FROM BUENA VISTA LAKE TO TULARE LAKE.

The only evidence offered by the defendants in this case tending to break the continuity of Buena Vista Slough, from Buena Vista Lake to Tulare Lake, other than the testimony of the witnesses Souther, Stoner and Ellis, which has been heretofore referred to in this brief, was, *first*, the testimony of the surveyors or engineers who ran a level line across the swamp land district through Sections 7, 8, 9 and 10, in Township 29 south, Range 23 east, and *second*, that of certain persons who at different times after the trial of this action was commenced, and while the trial was proceeding in the lower Court, made certain trips along the swamp land bordering on the slough, and across the same at some half dozen different points, commencing on the south, at a point running across Sections 7, 8, 9 and 10, in Township 29 south, Range 23 east, and extending north, to some point in Township 25 south, Range 22 east.

This Court will see that the defendant did not attempt to show that any of its witnesses had ever attempted to follow Buena Vista Slough from Buena Vista Lake to Tulare Lake. They selected certain points between Buena Vista and Tulare Lakes, and crossed the body of swamp and overflowed land, and then testified to what they found on such trips. All these trips were made through a dense growth of tules, so high that the parties could not see to the right or left. This clearly appears by the testimony of all the witnesses.

See pp. 343 to 345 of our first brief.

These witnesses made but seven crossings between Buena Vista and Tulare Lakes. The distance between the lakes is in a straight line some 52 or 53 miles (T., II, fol. 1486), and following the slough a much greater distance.

Commencing with the most northerly crossing that across Section 19, T. 25 S., R. 22 E., and Sections 23 and 24, T. 25 S,. R. 21 E. This crossing was in fact in the bed of Tulare Lake. (See Exhibit "A," annexed to findings.) *

The second crossing was from the Tule House, which is near the north line of Sec. 32. T. 25, S. R. 22 E.; and here all the witnesses find a well-defined slough on both the east and west side of the body of swamp land and channel connecting the two. The two crossings were at least three miles apart.

The third crossing across Secs. 31, 32 and 33, T. 26, S. R. 22 E., was at least seven miles south of the second, in a straight line, and following the slough Wible says, it was from 12 to 14 miles.

The fourth crossing, across Secs. 8 and 9, T. 27, S. R. 22 E., was some two miles south of the third.

The fifth crossing, across Secs. 9 and 10, in T. 28, S. R. 22 E., was some six miles south of the fourth.

The sixth crossing, across Sections 25 and 35, T. 28, S. R. 22 E., was some five miles south of the fifth.

The seventh crossing, across Sections 7, 8, 9 and 10, T. 29, S. R. 23 E:, was some five miles south of the sixth.

The distance between the most northerly and southerly crossing was in a straight line at least 24 miles, and following the channel, the distance was at least 35 miles if not 40.

At the second crossing all testify to finding three sloughs, one on the east and one on the west side, and a slough connecting the two.

* NOTE.—In this connection see photograph at end of this brief, showing crossings made by defendant's witnesses across the body of swamp land along Buena Vista Slough, and the level lines run by Macmurdo and Fillebrown.

And at every other crossing some of the witnesses found sloughs.

But admitting that at six crossings, no sloughs or channels were found, then we have the existence of a slough or channel established by plaintiffs for upwards of 50 miles long, which is shown by defendants' witnesses, not to exist at six different points and for a few yards at each point. Admitting such breaks did in fact exist, and at all such points the water ran over the surface of the swamp and overflowed land, still the findings are contrary to, and not justified by the evidence, and plaintiffs must recover, as such facts would not destroy the character of Buena Vista Slough, as a natural watercourse.

Macomber v. *Godfrey*, 108 Mass., 219;
Gillett v. *Johnson*, 30 Conn., 180;
Wilcox v. *Hausch*, Sup, Ct. Cal., Jan. 22, 1884.

In the last case cited, the Superior Court found as a fact that there was just such a channel running through a body of swamp and overflowed land as we have shown to exist through the body of swamp and overflowed land lying between Buena Vista and Tulare Lakes.

The finding reads:

"Sixth. That for one year prior to the construction "of said dam and ditch, there had been no water "flowing in Mill Creek. save and except such water "as had flowed through the ancient heads, channels "and sources of supply of said creek, so cleaned out, "opened up and deepened, as stated in the third find- "ing above; and without such work of opening and "cleaning out such channels aforesaid, the water "would not flow through said creek, excepting during "about six months in the year, *when the waters of the* "*Kaweah ran into a swamp above said Mill Creek,* "*and from said swamp through numerous channels* "*and sloughs, into and through said Mill Creek.*"

And the Superior Court found, as a conclusion of law, that there was a watercourse.

Counsel for the appellant in that case cited the same authorities relied upon by respondents' counsel in this, in support of the proposition that there was no watercourse, that it was but "mere surface drainage over "the entire face of a tract of land occasioned by un-"usual freshets or other extraordinary causes."

Pages 16 and 17, appellants' brief.

This Court held that such finding supported the conclusion of law and judgment of the Superior Court, and affirmed the judgment of the lower Court granting an injunction perpetually restraining the defendant from taking water from Mill Creek, following the uniform line of decisions of this Court where the rights of appropriators and riparian proprietors on a stream of water have come before this Court for adjudication.

That there are points on Buena Vista Slough where the channel is wide and shallow, we do not question; it is like many other streams that run through a comparatively level country—light soil.

Mr. Crocker, who is so intimately acquainted with this body of swamp land, says there are places along Buena Vista Slough where the fall is less than in other places, and that the channel is not so well cut out as where the fall is greater (T,, II, fol. 648); and at places where it runs quartering across the swamp it loses its full velocity, and at such places the water does not cut a channel so well defined (T., II, fol. 677–8).

F. W. Barnes also testified that Buena Vista Slough would, like Kern River, overflow its banks in low places when a large head of water was running in it. (T., II, fols. 1364 and 1379–80.)

S. M. Farman says that the banks of Kern River, in front of his house, are but two or three feet high, and

that the river always overflows at that point in high water. (T., II, fol. 2143.)

N. R. WILIKNSON describes Kern River as he first saw it, in July, 1871, at Jewett's Crossing. (This is almost due south of Bakersfield.) He says it was 150 yards wide, and the water was from four to five inches to two feet deep; that it would not average more than six inches. (T., III, fols. 300–1.) Still, the Court finds Kern River to be a natural watercourse.

WIBLE says there are places in Kern River where it is from 700 to 1000 feet wide, and at places where the banks are low it would overflow during high water. (T., II, fol. 2109 to 2113.)

And this is by the Court found as a fact (37th finding); yet the Court finds from testimony describing just such a water channel that Buena Vista Slough is not a watercourse.

A full reference to the testimony of the parties who made these crossings will be found in our first brief from pages 343 to 361, and on from pages 362 to 368 of the same brief will be found, a reference to the testimony offered by the defendants in reference to the level line run by MacMurdo and Fillebrown across the body of swamp land, and continuing from page 368 to 369, a reference to our evidence in rebuttal to such level line.

From pages 370 to 379, in that brief, we call attention to the difference in plaintiff's and defendant's witnesses in regard to knowledge of this Buena Vista Slough country, and their opportunities to know what they were testifying about when speaking of Buena Vista Slough as a water channel.

And on pages 379 to 383 we call attention to the manner in which evidence was suppressed or withheld by defendant's witnesses, where to give the true state of facts would be damaging to defendant's case.

From pages 383 to 387, will be found a reference to the evidence showing that nearly every witness called by defendant knew nothing about Buena Vista Slough until they were sent there within a few days before the trial of this case, or after it commenced, to qualify themselves to be witnesses in this case.

This Court, in passing upon the objection urged by us, that the findings in relation to Buena Vista Slough are not supported by the evidence, but contrary thereto, cannot but take into consideration:

1. The manner in which the findings (80) were prepared and signed.

2. The fact that a finding in our favor (11th) was set aside after the findings were signed and filed, and one in favor of defendant substituted in its place.

3. The fact that plaintiffs offered evidence in rebuttal that would have negatived several of the findings signed by the Judge, and such evidence was ruled out as cumulative.

HOW THE FINDINGS WERE PREPARED AND SIGNED.

The case, after trial and argument, was submitted to the lower Court for its decision, July 15, 1881 (T., I, fol. 489). At that time the Judge of the Superior Court requested counsel for plaintiffs and defendant to submit to him such findings as they desired in the case; that counsel did submit such findings to the Judge (T., I, fol. 490). Counsel for plaintiffs and defendant did submit to the Judge such findings as they desired the Judge should adopt in the case, and it appears from the record what the fate of the findings prepared by plaintiffs and defendant was.

"That the findings as a whole, eighty in number, sub-
" mitted by the defendants, were signed by said Judge
" as the findings of the Court in this case, after making
" some few and immaterial corrections in such findings;
" that the said findings were never submitted to the
" counsel for plaintiffs, nor did they ever see them until
" after they were signed and filed by the Court; that not
" a single finding submitted by the plaintiffs' counsel
" was by the Court adopted."

T., I, fol. 490.

The case was on trial some sixty days. It was fully argued by counsel for plaintiffs and defendant, and it involves large property interests. Still, when it comes to the most important step to be taken in the case, it is taken by the Superior Judge without giving counsel for plaintiffs any voice in the matter. We do not question the proposition that the Court must find the facts, and that it is charged with the duty and responsibility of finding the facts; and the Court may require counsel to suggest such findings as they may desire, and may adopt them or not, as it sees fit.

Our Supreme Court has criticized the practice of permitting the successful party to prepare findings, and suggested that the better practice would be if either party is to prepare findings it should be the defeated party.

Tewksbury v. *Magraff*, 33 Cal., 247-8.

And suggested that the better practice would be to submit the findings suggested to the respective parties before signing and filing.

Prince v. *Lynch*, 38 Cal., 531.

And we know that this is the practice adopted by nearly every Superior Court in this State.

Mr. Hayne, in his valuable work on New Trial and Appeal, just issued, after referring to the cases cited above, says:

"In practice the successful party is usually directed "to draft the findings, and too often the Judge signs "the draft presented to him without sufficient exami- "nation. This practice cannot be too strongly con- "demned. It results in the preparation by the attor- "ney of findings favorable to himself on every issue, "while the Judge may have decided in his favor on "some only of the issues. *In view of the rule that a "finding of fact will not be disturbed if there be a sub- "stantial conflict in the evidence, this practice results in "the grossest injustice to the losing party.* It is the duty "of the Judge to make his own findings. He may, "with perfect propriety, require either or both coun- "sel to draft the findings they desire. But that is "only to lighten his labor. *To adopt any such draft "without the most careful examination, both as to the "subject matter and the phraseology is to abdicate one of "his most important functions, and utterly subvert the "purpose of findings, as stated in Tewksbury* v. *Magraff, "above quoted.*"

Hayne on New Trial and Appeal, vol. 2, § 245, p. 740.

This case is a good illustration of the injustice resulting from the practice of signing findings prepared by the successful party without revision or without submitting them to adverse counsel.

A FINDING IN FAVOR OF PLAINTIFFS WAS SET ASIDE, AND ONE IN FAVOR OF DEFENDANT SUBSTITUTED AFTER THE FINDINGS WERE SIGNED AND FILED.

This we respectfully submit the Court had no power to do. The Court may supply a finding on an omitted issue by filing additional findings, but if there is an error in the findings as filed, the Court cannot review

the evidence and set it aside and substitute a new one, the remedy in such cases by motion for a new trial.

Cowing v. *Rogers*, 34 Cal., 652;
Prince v. *Lynch*, 38 Cal., 531;
Hedden v. *Jordan*, 28 Cal., 304;
Hayne, New Trial and Appeal, § 247.

It is true that the Judge of the lower Court says, in his order substituting a finding in place of one theretofore filed, that it is to correct a mistake, etc.

But when a Court has signed a finding, finding a particular fact, that finding cannot be said to be defective, and the Court substitute another in its place. Had the Court omitted to find as to which way the water ran after entering Buena Vista Slough from the middle branch of Kern River, the finding would have been defective, and additional findings could have been made and filed.

Gates v. *Salmon*, 46 Cal., 372.

The present Supreme Court has decided that a Superior Court may, after findings are signed and filed, file *additional* findings.

Hayes v. *Wetherbee*, 60 Cal., 399.

But it has never held that when the Court has found fully and directly on given points that it can, of its own motion, or on a motion made by a party to the suit, strike out such finding and substitute in its place a finding just to the contrary.

This can only be done on motion for a new trial or on appeal.

Cases *ante*.

ALL OF THE TESTIMONY OFFERED BY PLAINTIFFS IN REBUTTAL TO SHOW THAT THERE WAS A WELL DEFINED CHANNEL AT THE POINTS WHERE DEFENDANTS' WITNESSES CLAIMED TO HAVE CROSSED IT AND FOUND NO CHANNEL, WAS RULED OUT AS CUMULATIVE.

Then we have the other fact that the plaintiffs offer rebuttal evidence that had it been admitted would have negatived every fact found by the Superior Court as to the channel of Buena Vista Slough being continuous from Buena Vista Lake to Tulare Lake, and the evidence was ruled out, on the ground that it was "just simply cumulative testimony." (T., V, fol. 110). The Court, stating at the time that the testimony of our witnesses was uniform, that there was a slough, while that of defendant's witnesses was not uniform (fol. 110), still the finding is against the plaintiffs' uniform testimony. And at fol. 140–1, it will be seen that the testimony offered by plaintiffs in rebuttal, to show that there was no break in this water channel at one of the points where defendants' witnesses claimed to have found a break, is not even objected to by counsel as cumulative, but the Court invites an objection.

"The Court. You can state what you offer to show
" by this witness, that he found between certain sta-
" tions.
" Mr. Houghton. I offer to show by this witness
" that he found between Stations 131 and 133, a slough
" running out of the lake or pond which he has referred
" to, opposite that station, and I offer to show by him
" the slope of the eastern bank of the slough, and also
" of the western bank of that slough, where he crossed
" it. And I further offer to show by this witness that he
" followed that slough both ways and found a continuous
" channel from it.

" The Court. IS THERE ANY OBJECTION?
" Mr. Garber. WE OBJECT.
" The Court. OBJECTION SUSTAINED.
" PLAINTIFFS EXCEPT."

T., V, fols. 140–141.

And the motion to strike out an answer of this same witness, at folio 137, is of the same character, no ground of objection being stated by counsel. It was enough that plaintiffs desired to introduce rebutting testimony to cause the Court to refuse to let it in, or strike it out if it got in, without objection.

And this is repeated at folio 156, and again at folio 187, and when we desired to show that at the special points testified to by Souther and Macmurdo, where the slough was not well defined, that there was a well defined channel, and counsel now claim that that point is where the Court finds a break in the slough on Section 15, T. 30 S., R. 24 E., the Court again says:

"The Court. Gentlemen, it seems to me that this
" thing is progressing rather far. In the first place, as
" I have reiterated time and again, there has been testi-
" mony, cumulative, introduced by the plaintiffs, in ref-
" erence to those sloughs from Wible's Camp, in fact,
" from Buena Vista Lake down to the north line of Map
" number 2. You are seeking to go into that whole thing
" again by this same witness, who testified fully in ref-
" erence to it before, and by other parties who testified
" before to having been in boats down that slough. It
" is but re-opening the whole case again. I see no end
" to it. I think the Court has ruled sufficiently upon
" that."

T., V, fol. 158–9.

It will be seen that counsel for plaintiffs were laboring under a few disadvantages on their trial of this case; *first*, in placing before the Court evidence of a continuous channel to Tulare Lake; *second*, in securing findings in accordance with the evidence which the Court stated was sufficient to establish plaintiff's case; and *third*, in keeping in the record the single

finding in their favor. If there ever was a case where the Appellate Court should examine the evidence to see if there is a substantial conflict, we respectfully submit that it is this case, and we are satisfied this Court will examine the testimony on this question of the continuity of Buena Vista Slough from Buena Vista Lake to Tulare Lake, and if it does, it can only decide that the findings in that regard are not supported by the evidence.

If this Court should conclude that the findings in that regard are supported by the evidence, it must be because defendant's witnesses testified to breaks in the slough at certain points where they crossed the swamp and overflowed land, and if that be so, then it was error for the Court to refuse to permit us to show that no such breaks existed, and after refusing to admit the testimony offered by us, to find against us.

Estate of Pacheco, 23 Cal., 481.
Thompson v. *McKay*, 41 Cal., 221.

Counsel for defendant, page 240 of their last brief, say:

"The chief contention in this case has been "upon the question of water-course, and we have "therefore devoted ourselves, almost exclusively, to "the findings thereon. The objections of plaintiffs "to the other findings were made, we think, more "in a spirit of contention than as possessing any "real worth or intrinsic merit. We shall therefore "pass over them as briefly as possible."

They have certainly passed over our objections to the most of the findings in this case very briefly—many of them, in fact passing over without any attempt to establish the fact that they are supported by evidence, contenting themselves with copying them into their brief, and then adding a general statement that they are supported by the evidence.

This will hardly do, as the affirmative is upon the respondent, and when it is claimed that a finding is not supported by the evidence, he must point out evidence in support of it.

That such is the rule, was announced from the bench when this case was on argument, and could counsel have found any evidence in this record to sustain the findings we attack in this case, it would have been pointed out. In several cases where counsel for respondent have referred to the evidence in support of a given finding, it must only result in showing to this Court, that little attention was given by the Superior Court to the evidence actually offered in this case, in preparing its finding in this case, and this is particularly so in relation to the findings as to the rights of defendant under the notice of appropriation claimed to have been made in the interest of the Calloway Canal, and to these findings we now call the attention of your Honors; they can be briefly disposed of, as but four witnesses testified in relation to such notice, and the evidence of these witnesses was by no means lengthy.

V.

THE CALLOWAY CANAL NOTICE OF APPROPRIATION.

The 51st finding, finds as a fact, that—

> ***"On the 4th day of May, 1875, the grantors of the "defendant desiring to appropriate seventy-four "thousand (74,000) inches of the waters of Kern "River, measured under a four-inch pressure, posted "a notice in writing in a conspicuous place at the "point of intended diversion."***

There is no evidence to support this finding. Counsel for defendant do not attempt to refer to the testimony of a single witness who testified that this notice was posted on May 4th. See their brief pp. 240 to 244.

MAUDE says he saw the notice posted on the *seventh* of May, 1875. (T., III, fol. 1636).

MCFARLAND says he saw the notice posted "sometime along in May, 1875," but that he did not read it at that time, just glanced at it. (T., IV, fol. 10.)

Not having fixed the date at that time to suit them, counsel for defendant question the witness again, and he says:

"I was over the river there in April and May
" of course.
" Q—Where did you first start in on the other side of
" the river to assess?
" A—I started in right by Poso Creek and in around
" through there on that first trip. I was over there per-
" haps two weeks.
" Q—Did you see this when over there on the first
" trip?
" A—No, sir; I was not there at all the first trip. I went
" over again somewhere along the first of May. It might
" have been the middle of May."
(T., IV, fol. 17-18.)

JACKSON says: "I saw the notice of appropriation in May, *about the 7th or 8th*, 1875, (T., IV, fol. 76.)

ANDERSON says: "I saw the notice some time in May, the fore part of May," (T., III, fol. 1724), and on cross-examination, he says: "I saw the notice posted
" at the head of Calloway ditch in 1875, in the fore
" part of May, *the 9th or 10th*." (T., III, fol. 1737.)

No other witness gives the date that he saw the notice posted.

The above, with the exception of the testimony given by McFarland, appearing on folio 18, and quoted by us, is the evidence which respondents refer to in their brief (p. 240-241) to support the finding that on May 4TH, 1875, the grantors of defendant posted a notice in writing at the head of the Calloway Canal, and they do not claim that there is any other evidence in this record when this notice was posted.

We respectfully submit that this finding cannot be sustained.

We have called special attention to the above finding, and the fact that no witness fixed the date of posting earlier than May 7th, or three days after the date named in the finding, that we may more forcibly present our objection to another portion of the same finding, wherein it is found—

"A copy of said notice was, within ten days AFTER "IT WAS POSTED AS AFORESAID, recorded in "the office of the County Recorder of the County of "Kern."

In support of this finding, in so far as it finds when the notice was recorded, counsel refer to the endorsement appearing on the copy of the notice introduced in evidence, and the entry in the record of the Recorder of Kern County, to the effect that the notice was recorded May 4, 1875, at 2 o'clock P.M., and this in the nature of things could be the only evidence of that fact.

(See p. 241, defendant's brief.)

This hardly supports the finding of fact that the notice was recorded *within ten days* AFTER *it was posted,* when the earliest date that any witness says it was posted was on the 7th, or three days *after it was recorded.*

The statute governing the appropriation of water.

§ 1415, Civil Code, reads:

"A person desiring to appropriate water must post "a notice, in writing, in a conspicuous place at the "point of intended diversion, stating therein" * * * It then goes on and prescribes what the notice must state or contain; then follows the provision for recording the notice, as follows:

"*A copy of the notice must, within ten days after*

"*it is posted*, be recorded in the office of the Re-
"corder of the county in which it is posted."

The notice *must* be recorded *after* it is posted.

When a Statute prescribed the order in which steps are to be taken by a party who claims rights under such Statute, the steps must be taken in the order prescribed.

The Practice Act provided that an appeal should be made by filing a notice of appeal and serving a copy on the adverse party. (§ 337).

And further required the undertaking on appeal to be filed within five days *after* the notice of appeal is filed. (§ 348).

Under these provisions the Supreme Court has repeatedly held that a notice of appeal that was first served and then filed was not good.

Buffandeau v. *Edmondson*, 24 Cal., 94.
Moulton v. *Ellmaker*, 30 Cal., 527.
Boston v. *Haynes*, 31 Cal., 107.

And that an undertaking filed before the notice was filed was of no validity.

Dooling v. Moore, 19 Cal., 81.
Buckholder v. *Byers*, 10 Cal., 481.

So in case of attachment of real property under the Practice Act, the Court held that a party acquired no right unless the steps were taken in the order named in the Statute.

"The only question on this appeal is, whether an
"attachment of real property, standing on the records
"of the county in the name of defendant, and which
"was served by first filing a copy of it with the
"County Recorder, together with a description of the
"property attached, and by afterwards, with all
"reasonable dispatch, serving a copy on the occupant
"of the premises, will overreach a conveyance made

" by the defendant to a purchaser in good faith, and
" for a valuable consideration, intermediate the filing
" of the copy with the Recorder and the service of a copy
" on the occupant. Section one hundred and twenty-
" five of the Code provides that an attachment of real
" property, standing on the records of the county in
" the name of the defendant, shall be served 'by
" leaving a copy of the writ with an occupant thereof,
" or, if there be no occupant, by posting a copy in a
" conspicuous place thereon, and filing a copy, to-
" gether with a description of the property attached,
" with the Recorder of the county.' To complete
" the service and create a lien, both the acts required
" by the statute must be performed. Neither the
" filing with the Recorder, without the service or post-
" ing of a copy, nor the performance of the latter acts
" without the filing, will amount to a service of the
" attachment and create a lien on the property. The
" performance of both acts is essential to create a
" lien. (*Wheaton* v. *Neville*, 19 Cal., 44.) *But in*
" *addition to this, the requisite acts must be performed*
" *in the order in which they are named in the statute—*
" *that is to say, the service on the occupant, or the posting*
" *on the premises, must precede the filing of a copy with*
" *the Recorder, which latter act was intended to give*
" *notice to third persons dealing with the property that*
" *it had been attached.* It was only, then, for the first
" time, that it had been attached; and if the copy be
" first filed with the Recorder, and a copy be after-
" wards served on the occupant, or posted on the
" premises if there be no occupant, it is clear that
" during the interval which elapsed between the filing
" and a service of a copy on the occupant or the post-
" ing, as the case may be, the filing of the copy could
" not impart notice of a fact which did not exist, to
" wit: that the property *had* been attached, for it
" could not be, in fact, attached in any case until after

"the service on the occupants or the posting on the "premises. It is obvious, therefore, that the statute "intended that the service or posting of the copy "should precede the filing of a copy with the Re-"corder, 'together with a description of the property "attached.'"

Main v. *Tappener*, 43 Cal., 208–9, approved in; *Sharp* v. *Baird*, 43 Cal., 580.

So, in this case, for the defendant to acquire any rights under the notice of appropriation it was necessary for the Court to find that the notice was posted before it was recorded, and it so found, although the evidence is clear, conclusive and uncontradicted (all introduced by the defendant): That the notice was recorded at least three days before any one saw it posted. And it will be seen that the Superior Judge, as a conclusion of law (3d T., I, fol. 468–9), finds that the rights of defendants to the water appropriated by them related back to May, 1875, although the defendants did not, in fact, divert any water until 1876, or until after plaintiff had obtained patents from the State of California for most of the land described in the amended complaint. The claims of defendant are only made to ante-date the patents of plaintiffs by dating the claim of defendant from the time this notice is found to have been posted and recorded, and such findings have no evidence to support them, but, on the contrary, are contrary to the evidence of defendants' witnesses in relation to the posting and recording of such notice.

For this error alone the judgment must be reversed.

FIFTY-FIFTH FINDING.

By this finding the Court finds—

"That the said notice of appropriation was signed by the said grantors of the defendant."

T., V, fol. 751.

Those grantors were sixteen in number: W. H. Baxter, J. P. Moore, Charles F. Brown, S. N. Putnam, Isaac Upham, William Holden, James T. Ish, L. L. Baker, E. W. Scott, J. A. Robinson, J. H. Wildes, O. P. Calloway, W. Wilkinson, John L. Cobleigh, A. J. Haight, John Burcham. (T., IV, fol. 1604–5.)

The counsel for defendant do not now claim that there is any evidence to support this finding. But the position they now take is that it was not necessary for any one to sign it. That "a mere printed statement "that" John Smith claimed, etc., "without any signa- "ture whatever, would have been a sufficient compli- "ance with the law."

P. 267 of defendant's brief.

But this was not a notice containing the names of any one in its body; the only manner it could be connected with any particular person was by the names signed to it, and not a single witness who testified to having seen the notice when posted could state what names were signed to it.

A. C. MAUDE could not.

He says:

"I remember some of the names that were on that "notive. I remember Gov. Holden and Mr. Calloway, and "a man named Wilkinson. I thought it was this man Wil- "kinson in town. I found afterwards is was not. A man "named Putnam, a real estate man in San Francisco. I "cannot think of any more now. I know a man named "Burcham. His name was attached to it. He had told "me the notice was up."

T., III, fol. 1636–7.

McFarland could name two (T., IV, fol. 11).

Mr. Dumble only remembered two names, Mr. Calloway and Mr. Burcham, and says: "There were seven "or eight other names, probably ten." (T., IV, fol. 60.)

Mr. Jackson says:

"I remember some of the "names that were on there. There was Governor William Holden, Mr. Robinson, Mr. Putnam, Mr. Baker, "I think, and Calloway and Burcham. They told me "where the notice was. I think the name was on it. I "don't remember distinctly, Calloway's was on and Mr. "Burcham'.

"Q—How came you to remember those names?

"A—Mr. Holden, Mr. Calloway and Putnam and all "of those parties; we had talked about it in the city, and "I naturally looked to see if they were on. *I rather ex-"pected to find myself on there, to find my name on "there.* I knew quite a number of parties whose names "were on there. But I cannot remember their names "now."

T., IV, fol. 78–9.

Mr. Anderson does not remember the names of but two parties.

He says:

"There were a "number of names signed to it, but I don't recollect all "of the names. I remember the names of Mr. Calloway "and Mr. Burcham; I don't recollect the other names. "There were a number of other names. There were "two columns of names on the notice."

T., III, fol. 1725–6.

Mr. McCord knew nothing about who signed it. He says: "I noticed on this notice that there were "several names. That is the first that I knew there "were several men in the Calloway; I don't recollect "that I read it at all." (T., III, fol. 1468).

Mr. Souther says: "I did not read that notice to "see what it said." (T., III, fol. 730).

The above are all the witnesses who testified to ever seeing the notice of the Calloway Canal posted. Not one of them remembers more than six names that were signed to it. Still, the Court finds that such notice was signed by all the grantors of the defendant, 16 in number.

Not a single witness testified to the fact that the notice was signed by any of the following of defendant's grantors: W. H. Baxter, J. P. Moore, Charles F. Brown, Isaac Upham, James T. Ish, E. W. Scott, J. H. Wildes, John L. Cobleigh and A. J. Haight; nor is there any evidence in the record that any of the above named grantors (9) of defendant ever signed the notice.

We had the defendants produce, in this Court, the copy of the notice that was given to the Recorder of Kern County, and it appeared on its face that it was all in one hand-writing, and all the signatures were in the same hand-writing, and we request that your Honors will examine this copy.

In our first brief, at pages 57 and 58, we have fully noticed our objection to the introduction in evidence of this notice, as well as pointing out its numerous defects, and we refer your Honors to pages 35 to 50 of our first brief, where we have fully presented our objections to this notice and numerous others admitted in evidence.

We differ with counsel for defendant as to the proposition that it is not necessary that the notice should be signed by any one. The Statute clearly contemplates that the parties claiming the water should put their names to the notice of appropriation.

See Sec. 1415, C. C.

"A *person* desiring to appropriate water must post a notice, in writing, etc. * * * stating first that *he* claims," etc.

A notice signed by no one is of no validity.

The law of Missouri, like that of California, authorizes depositions to be taken upon written notice, etc.

It has been held in that State, that a motion given to take a deposition, but signed by no one, was good for nothing.

Bohn v. *Devlin*, 28 Mo., 319.

See also

Rogers v. *Haskins*, 14 Ga., 166.

The finding reads:

"That the said notice of appropriation WAS "SIGNED by the said grantors of the defendant."

Not that some one signed for them, nor was there any evidence in the case that a single one of the sixteen grantors of defendant ever signed the notice. The evidence at best is that the notice had on it some ten or twelve names, but who signed these names, or whose names they were other than John Burcham, Mr. Calloway, Mr. Baker, Mr. Robinson, Wm. Holden, "and a man named Wilkinson," "and a man named Putnam, a real estate man in San Francisco," (T., III, fol. 1636–7,) does not appear.

It has never been held that a notice locating a mine was sufficient without it was signed, or the names appeared in the body of the notice, and when it appeared that a locator placed on such a notice names other than his own, such notice is only held to be good and admissible in evidence under the provisions of the Code prescribing that Courts should admit in such cases proof of mining customs, usages and regulations in certain cases, and that if established, the Courts should, in certain cases, be governed by them.

There is no such provision in the Code in relation to water locations.

§ 748, C. C. P., and § 621, Practice Act.

Morton v. *Solambo C. M. Co.*, 26 Cal., 530.

FIFTY-SIXTH FINDING

Is that the Calloway notice of appropriation was recorded in the Recorder's Office of Kern County.

Our objection to this finding will be found on pages 39 to 47 of our first brief, where we refer to the provisions of the Civil Code relating to the acknowledgment and recording of written instruments, and to numerous authorities in support of our objection that the copying of a document not properly authenticated by a County Recorder into a book kept in his office, is not considered in law a recording of such instrument.

Counsel for defendant would sweep away the Code and all of the numerous authorities cited by us by general statement: "For the same reasons as it was "unnecessary to sign, it was also unnecessary to ac- "knowledge. The law did not require acknowledg- "ment, though it made express provisions for record- "ing."

Page 267–8, defendant's brief.

They do not cite a single authority in support of the statement that the law does not require such instruments to be acknowledged, nor do they question the soundness of any of the cases cited by us; but in place of argument and authorities, we are informed that: "To apply the provisions cited by counsel as to "the acknowledgments of deeds to notices of this "kind, would simply be to destroy every appropria- "tion ever made, whether of mines or of water."

Page, 268, defendant's brief.

We hardly think such a statement will cause the Court to disregard the plain provisions of the Civil Code, and a rule adopted by all the Courts since Recorder's Offices have been known, that an instrument must in some manner be authenticated before it is entitled to be recorded. Nor do we agree with the counsel that to apply such a rule would destroy every appropriation of water ever made, and if such should be the effect it will hardly deter this Court from declaring the law to be as established by the Codes and cases cited by us. And so far as mining notices are concerned, no one knows better than counsel for respondent that such notices are only made good by customs, usages and regulations established and in force at the bar, or diggings, where the claim is filed. Such notices are rarely if ever recorded in a County Recorder's Office. If a custom existed of recording water notices in a County Recorder's Office without acknowledgement, it would amount to nothing, as it would be in conflict with the law governing the recording of written instruments. Besides, no such custom was proven.

Counsel say: "The law did not acquire acknowl-"edgments, though it made express provision for re-"cording."

We are not aware that the Legislature has attempted to specifically name every instrument that shall be acknowledged.

The Code provides generally (§ 1161) that "before "an instrument can be recorded (except certain classes), "its execution must be acknowledged," and (§1158) "That any instrument or judgment affecting the title "to or possession of real property may be recorded "under this chapter."

The Code then points out the form of a certificate of acknowledgement, but it does not enumerate deeds

or mortgages as instruments to be acknowledged any more than it does water notices. It simply provides that they shall not be recorded unless acknowledged.

If the point made by counsel for respondent, that plaintiffs not being appropriators, are not entitled to exact that these provisions of the Code should have been complied with, as such provisions are intended to fix the relative rights of appropriators, then it was error to admit in evidence the notice, and the judgment in this case must be reversed, as the judgment of the Superior Court in favor of defendant is based upon the fact that this notice of appropriation of Calloway and others gave to defendants a right as against plaintiffs, who are riparian owners, and it was only by reason of the posting and recording of this notice in May, 1875, that the Court found that the rights of defendants antedated those of plaintiffs.

THE FIFTY-SEVENTH FINDING IS NOT SUPPORTED BY THE EVIDENCE.

a. It appears by the evidence that the line of the Calloway Canal was not surveyed and staked out within sixty days after the pretended notice of appropriation was posted. The line of the canal was not located until many years after May 1, 1875.

MACMURDO says he staked out the line of the canal in 1877. (Vol. 4, fol. 1200).

b. It appears by the evidence that at the time of the commencement of this action, the Calloway Canal was not completed to a point where it crossed Poso Creek.

Testimony of Macmurdo (Vol. 4, fol. 1205);
Testimony of Hayes (Vol. 4, fol. 1418);
Testimony of Creasy (Vol. 4, fol. 1427);
Testimony of Neal (Vol. 4, fol. 1432).

c. No witness testified as to the cost of construction of that part of the Calloway Canal, built prior to the commencement of this suit.

JAMES testified that the whole canal cost $102,000, but he did not know what that portion constructed prior to May, 1879, cost. (Vol. 4, fol. 886–7).

It appears by the testimony of Macmurdo, Fillebrown and James, the engineers who had charge of the canal, that nearly all the lateral or side ditches were constructed after this suit was commenced.

CARR says but 1000 acres were irrigated from this canal in 1878. (Vol. 4, fol. 1666–8).

The effort made by counsel for defendant to show that there was evidence to sustain certain other findings of the Court below, is still more feeble than that made to uphold the finding relating to the Calloway notice of appropriation.

They do not attempt to refer to any evidence in support of the findings, nor do they, in but very few cases, attempt to meet our objections made to such findings in our first brief.

We can, in little space, dispose of the findings referred to in their brief, on pages 256 to 275, having in our first brief pointed out wherein they are not supported by the evidence.

We take them up in the order adopted by respondent's counsel.

VI.

FINDING FIFTEEN.

Counsel for defendant do not refer to any testimony in support of this finding other than that referred to in connection with their objections generally to all of the findings relating to Buena Vista Slough being a continuous watercourse from Buena Vista to Tulare Lakes.

(See page 237 of their brief.)

We refer your Honors to page 400 of our brief, filed in this case, where will appear our objection to this finding on the ground that it is not supported by the evidence. And we also call the attention of the Court to the testimony of Walter James, a civil engineer, and one of the defendant's witnesses, who testifies to the volume of water usually flowing through Kern River in the spring of the year:

"To Mr. HOUGHTON. I cannot give the exact date that
" I crossed Kern River on Sec. 18, in T. 29, R. 28, in
231 " the year 1871. It was the latter part of April or early
" in May. I don't remember. I said the water was 300
" feet wide, and from four to six feet deep. *I said there*
" *was a fair stage of water.*
" Q—When asked to give the width and depth, you
" said it was 300 feet wide and from four to six feet
" deep.
" A—I think that is my recollection.
" Q—*Would not that be more than a fair stage of*
" *water at that point?*
" A—*Not at that time of the year, I don't think. I*
" *think there is such a body of water flowing by that*
232 " *point to-day.* I cannot say whether there was as much
" water flowing at that point at that time as there is now.
" I have not seen this place for some time. I only state
" my recollection of the appearance of the water at that
" time. I live on the other side of the river, and cross
" it often. Have crossed it within a week."

T., III, fol. 230–2.

This testimony, it appears, was given on May 3d, 1881, only three days after Col. Mendell had testified

that he found but a thousand feet of water running in Kern River at the Pioneer Bridge, and about the same amount running from Kern River into Buena Vista Slough. (T., III, fols. 1018 and 1027).

VII.

FINDINGS TWENTY AND TWENTY-TWO.

The only reference made in counsel for defendants' brief relating to the evidence to support these findings will be found on pages 237, 238, as follows: "That as stated in findings twenty and "twenty-two, the defendant has not prevented, or "in any way hindered the water of Kern River "from flowing to, along, by, over and upon the "lands of plaintiff." This is simply a statement of counsel. It is not supported by any testimony whatever; and is fully answered by us in our reference to testimony in connection with finding fifteen. The testimony of Walter James alone is sufficient to show that those two findings are contrary to the evidence. James stated that in April or May, 1871, —which is admitted by counsel in this case to have been a dry year—there was a stream of water three hundred feet wide and from four to six feet deep—which Mr. James states was a fair stage of water—running in Kern River at a point where he crossed the river on Section 18, in Township 29 south, Range 28 east, which section is due north from the town of Bakersfield.

Col. Mendell testifies that the difference in elevation between Bakersfield and Buena Vista Lake is about 120 feet. (T., III, fol. 1007). The distance between these two points is about 20 miles, which would make the grade about 6 feet to the mile.

Prof. Davidson says the fall is about six feet to the mile. (T., II, fol. 1481–2).

At the time Mr. James testified, the Calloway Canal must have been taking a full head of water from Kern River, and just below the point, where he crossed, and was testifying in relation to, still at the Pioneer Bridge, one-third of the distance between the head of the Calloway Canal and Buena Vista Slough, there was flowing but 1000 cubic feet of water per second, and the same amount was flowing in Buena Vista Slough, showing that not a single foot of water was lost in flowing some fifteen miles or two-thirds of the distance between the head of the Calloway Canal and Buena Vista Slough.

VIII.

FINDING TWENTY-THREE.

Defendants' counsel referred the Court to no testimony to support this finding, although on page 401 of our brief we claim that it was not supported by the evidence, and refer the Court to testimony directly in conflict with the finding.

IX.

FINDINGS TWENTY-FOUR, TWENTY-FIVE, TWENTY-SIX AND TWENTY-SEVEN.

Our objections to these findings the counsel for defendants dispose of in a few words, on page 238 of their brief, as follows:

"The failure of the water to flow through Buena "Vista Slough to plaintiffs' lands, and to irrigate and "moisten said lands, was not attributable to, or by "reason of any diversion or appropriation of the "waters of Kern River or other act by defendant. "Nor did said lands become dry or deteriorated in "value by reason of any diversion or appropriation of "water or other act by defendant."

We refer the Court to our first Brief filed in this case, pages 402, 403, where we have referred to the testimony, showing that all of these findings are contrary to the evidence.

X.

FINDINGS TWENTY-EIGHT AND THIRTY-FIVE

In support of these findings we have simply the statement of counsel that they are supported by the evidence. They do not favor the Court with any reference whatever to any evidence supporting them or either of them. (See page 238, Respondent's Brief.)

We refer your Honors to our first Brief, pages 404 and 406, where we have referred to the evidence of numerous witnesses who testify that a continuance of the diversion and appropriation of the water of Kern River in future by the Calloway Canal would deprive the lands of plaintiff of their natural moisture and cause them to become dry and deteriorated in value.

In addition to the testimony referred to in our former Brief, we refer the Court to the testimony of Mr. F. A. Tracy, who lived on Buena Vista Slough, owning land there from 1864 to 1878 or '79, and during all that time was raising cattle and pasturing them along Buena Vista Slough from Buena Vista Lake to Tulare Lake. He says:

" " Q—Do you know what kind of land is necessary
" to raise cattle, and the amount of water required to
" conduct the business in connection with them?
987 " A—Oh, yes.
" Q—What was the effect upon the land when you had
" them, the short seasons of water during the years
" 1867 and 1868, or 1866 and 1867?
" A—Well, there was a shorter growth of grass.
" Q—What was the effect upon the cattle by reason of
" the short growth of grass?
" A—They didn't do so well.
" Q—*What would be the effect upon those lands in*

" *case you should turn all of the water out of Buena*
" *Vista Slough, so that no water would run down through*
988 " *the slough and over those lands?*
" Mr. GARBER. I object to the question, as calling for
" a mere opinion of the witness, and as being hypothet-
" ical and not calling for the facts.
" Objection overruled. Defendant excepts.
" A—*I think that land down there without water would*
" *be entirely valuelesss for raising cattle.* I have been a
" farmer, and have been cultivating land; have been inter-
" ested in farming for years, which was from 1852 to
" 1857. I was then in San Joaquin county. I have
" been engaged in farming, also, in this county for some
989 " time, though not direct with my own hands, in this
" valley. I have a farm here now. I think I have been
" farming five or six years.
" Q—Are you familiar with land and the capacities of
" land for agricultural purposes?
" A—Yes, sir.
" Q—*Then what would be the effect upon the land, as*
" *agricultural land, if you should turn all the water out*
" *of Buena Vista Slough, and prevent it from flowing*
" *through?*
" A—*I suppose it would not be worth anything for*
" *agricultural purposes.*"

T., II., fols. 986–989.

In this connection we would suggest that the Court read the twenty-ninth finding of fact. It reads:

29.

" ***That owing to the nature of the climate and the***
" ***country, and the slight rainfall where the said lands***
" ***of plaintiffs are situated, the same, unless irrigated by***
" ***waters flowing from a distance, are unfit for cultiva-***
" ***tion and pasture; and there is no natural irrigation***
" ***of them, except that, as is stated in these findings, they***
" ***are moistened and naturally irrigated by the percola-***
" ***tion and seepage and overflows in these findings men-***
" ***tioned; AND THERE IS NO MEANS OF IRRI-***
" ***GATING THEM AT ALL, SAVE BY THE***
" ***WATERS OF KERN RIVER, OR OF BUENA***
" ***VISTA AND KERN LAKES.***"

And the further finding of fact:

65.

"That the natural drainage of Kern River and the "surrounding country is, and ever has been, to and into "Kern and Buena Vista Lakes, and that in their nat- "ural condition Kern and Buena Vista Lakes, when "full, form one continuous body or sheet of water; that "the natural and usual flow of the waters of Kern "River, whether through the South Fork or through "Old River, or through New River, is and has ever been "to and into said Lakes, and that the ordinary and "natural receptacle, terminus and place of discharge "of the natural, usual and accustomed flow of the "waters of Kern River is and ever has been Kern "and Buena Vista Lakes."

Here are two findings:

1st. That plaintiffs' lands are unfit for cultivation and pasturage, unless irrigated with water from a distance; and that no water can be obtained to irrigate the land except it be from Kern River and from Kern and Buena Vista Lakes.

2d. That the usual flow of Kern River is and always has been into Kern and Buena Vista Lakes.

And Professor Davidson testified that Kern and Buena Vista Lakes have no other source of supply than Kern River (T., II, fol. 1485–6), and that there is no outlet for the waters of Kern and Buena Vista Lakes except down Buena Vista Slough. (Fol. 1484.)

Still, counsel contend that the twenty-eighth finding, which finds:

"That a continuance of the diversion and appropria- "tion of the water of Kern River in the future to the "extent it has taken place heretofore, and to the capac- "ity of the Calloway Canal, will not deprive the said "lands of the plaintiffs of their natural moisture, or "cause them to become dry or deteriorated in value, or "deprive them of water for general uses, or prevent "them from being irrigated or moistened by the waters "of said Kern River."

is supported by the evidence, and that an appropriation of 600 cabic feet of water per second from Kern River will in no manner affect the lands of plaintiffs, or cause them to become dry or deteriorated in value, or prevent them from being irrigated or *moistened* by the waters of said Kern River.

This finding is not only not supported by the evidence, but it is in conflict with, and contradictory of, the 29th and 65th findings.

The position taken by counsel for defendant is that Kern River cannot be considered a watercourse after its water enters Kern and Buena Vista Lakes, nor can any one who owns land on a stream flowing from Kern and Buena Vista Lakes complain of a diversion of water from Kern River before it enters the lakes, although the lakes have no other supply than Kern River.

In other words, one of the largest rivers in California, in its course to Tulare Lake, runs through two small lakes, one having an average of 7000 or 8000 acres and the other from 8000 to 10,000 acres (see testimony of J. D. Schuyler, T, III, fol. 1600), and these two lakes connected by a well defined channel (testimony of Schuyler, T., III, fol. 1109 and fol. 1586 to 1588), and the only outlet to the lakes a single channel, leaving the lakes at the opposite end from where the river enters them, or by the same channel that it enters, that the channel that takes the water from the lakes cannot be considered a part or continuation of the river that supplies the lakes, or, as counsel say, terminates in the lakes, although there is a continuous current through Kern and Buena Vista Lakes and the channel connecting them and into Buena Vista Slough. (Testimony Hudson, T., II, fol. 215–16).

If this be good law, then no person owning land on a watercourse can complain of any one who takes the

water from the river above him, provided the stream, in its natural course after it passes the point at which the water is taken out and before it reaches the land of a riparian proprietor, runs through a small lake, or at any point widens out and forms a broad expanse of water. That is, the continuity of a watercourse is broken when it passes through a small lake.

This is not law. It matters not what the source of supply to the stream that runs through a riparian proprietor's land may be, none above him can disturb that supply, not even if the water rises on his own land.

If every riparian proprietor is at the mercy of every person owning land on a river above him simply because the river runs through a lake on its way to the lower riparian proprietor, then the rights of riparian proprietor are of little value on most rivers in this country, for they all, or nearly all, at certain points, form much larger bodies of water than are Kern and Buena Vista Lakes.

A party could take all the waters from Clark's Fork of the Columbia above Lake Pend d'Oreille, and no one owning land below could complain, simply because the river, coming in its natural course to a deep cañon, spreads out and forms a body of water some 40 miles long in its course to the sea.

The same would hold true of the Yellowstone River, which forms the Yellowstone Lake and then passes on to the Missouri.

And the same would be true as to nearly all of the numerous rivers in Maine, which in many instances course through numerous lakes and ponds in their course to the Atlantic or to the St. Lawrence, particularly the Allagash, Penobscott and Kennebec.

But such is not and never has been the law. An owner of land on a watercourse is entitled to protection as against any one who diverts water from any

tributary to that watercourse, whether it be from a branch of the stream, from a lake, pond or spring.

This very question was recently presented to the Court of Appeals of New York.

Smith v. *City of Rochester*, 92 N. Y., 463.

Certain parties owned mill privileges on a creek formed by the *surplus* waters of three small lakes.

Defendants diverted a portion of the water of one of lakes to supply the City of Rochester with water, and they were acting under authority of an Act of the Legislature of New York.

The defendants claimed that as the lake was navigable (being seven miles long, and one and one half miles wide,) that the State could authorize the appropriation of the water without regard to the rights of parties who owned land on the outlet of the lake.

But the Court held that the owner of the stream that was formed from the flow of the surplus water of the lakes " possessed all the rights in the running water of this stream that belonged to riparian owners of any stream or watercourse" (p. 474), and that the Legislature could not deprive them of that right, unless upon proper proceeding to condemn the rights of the parties, and compensation being made to them for any injury sustained by them.

If the surplus water that would flow to a riparian owner from a lake can not be taken from the lake, much less can it be taken from the river supplying the lake.

It is no defence for defendant to allege and prove that he diverts the water from a stream that supplies Kern and Buena Vista Lakes. We are entitled to the benefit of the flow of all streams and tributaries that contribute to the flow of water down Buena Vista Slough.

Priest v. *Union Canal Co.*, 6 Cal., 171.

This point was presented to this Court in the unreported case of *Blanchard* v. *Bracken*, decided Feb. 4, 1878, which we shall hereafter more fully refer to. In that case, an action by a riparian owner on the Santa Paula Creek, an injunction was obtained in the District Court for Ventura County restraining defendant from diverting water from the Sisar Creek, which the Court found was a tributary of the Santa Paula Creek, and the fifth finding reads:

"Said appropriation of the waters of the Sisar ma-
"terially decrease the volume of water naturally flow-
"ing in the Santa Paula. The waters of the Sisar
"ordinarily sink in their channel a short distance
"below the point of diversion by defendant, but
"reappear in the same channel, and finally empty
"into the Santa Paula."

The Supreme Court affirmed the judgment of the District Court, which awarded a perpetual injunction restraining the defendant from diverting water from Sisar Creek.

If an upper proprietor exhausts a spring or marsh which is the souce of a watercorse and thereby stops the stream, he is liable.

Gould on Water, § 213 and auths.

Or if he extends a ditch into a marsh upon the border of a lake, so as to lessen the water power of a river into which the lake empties, and upon which plaintiff's mills are situated.

Gould on Water, § 213;
Bennett v. *Murtaugh*, 20 Minn., 151.

Water flowing from a surface spring, though not in a perfectly defined channel, into adjoining land, the owners of such land are entitled to the flow, and will

be protected in it by injunction, against any diversion by the owner of the spring.

Gould on Water, Sec. 536, and auths.

So if a spring rises upon the land of one owner, and forms and runs a stream on to the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel.

Arnold v. *Foot*, 12 Wend., 330.

"The fact that a river broadens into a pond-like sheet, with a current does not deprive it of its character as a river."

Gould on Water, Sec. 79.

Bassett v. *Salisbury, M. Co.*, 43 N. H., 569.

Had plaintiffs failed to show any channel through their land, except that at the Tule House, where the defendants' witnesses testified that it extends for miles both northerly and southerly of that point, we should recover in this case, as plaintiffs are entitled to the benefit of the flow of water through that portion of their land, and to the supply furnished by the flow from Kern River or from Kern and Buena Vista Lakes, and across the swamp and overflowed land to the channel that runs through plaintiffs' lands in the townships north and south of the Tule House.

Gould, in his work on water just issued, says:

"A stream does not cease to be a water-course be-
" cause at certain points it spreads over a level meadow
" and flows for a distance without defined banks, be-
" fore flowing again in a defined channel."

Gould on Water, § 264 and auths.

And the same rule is recognized in the case of

Ogburn v. *Connor*, 46 Cal., 346.

And in the unreported case referred to by the Court in its decision in that case, *Castro* v. *Bailey*, No. 2023, decided at the October Term, 1869.

The case not being in the reports, we give the opinion as printed in the "Bulletin" after it was filed.

Castro v. *Bailey*.

"The gravamen of this action is that the defendants "erected a dam whereby the waters, which, during "freshets, found their way into the bay across the "lands of the defendants, were diverted from their "natural and accustomed course and were thereby "made to flow across and upon the plaintiff's land "whereby his growing crops were injured, and ren-"dered wholly or partially unfit for cultivation. In the "complaint the dam is alleged to have been erected "across a brook or stream called or known by several "different names; and the defendants claim that the "proof shows there was no brook or stream at the par-"ticular spot where the dam was erected; and that "the waters, during freshets, spread out at that point "and dispersed themselves over Bailey's land greatly "to his detriment; and that the dam was simply in-"tended, and only had the effect, to concentrate the "water into an old channel so as to protect Bailey's "land from overflow." * * * "Nor is it material "whether the effect of the dam was to divert a run-"ning stream from its natural channel, or only to "collect into one body the waters which had been ac-"customed to disperse themselves over Bailey's land "in finding an outlet to the bay." * * * 'If the "water, during freshets, naturally spread over "Bailey's land, he had no right to relieve himself of "this inconvenience at the expense of the plaintiffs, "and by erecting an artificial barrier so to accu-"mulate and divert the water as to overflow the plain-"tiff's land, which would otherwise have been free "from inundation if the water had been left to find "its accustomed outlet to the bay."

XI.

FINDING THIRTY-SIX.

Again, we simply have the statement of counsel that this finding is supported by the evidence. The Court is not referred to any testimony which they claim justifies this finding. On page 406 of our first brief we have referred to the testimony of Mr. Crocker and other witnesses, who testified as to the plaintiffs' being compelled to pump water for their cattle, on account of the water of Kern River being diverted by the defendant and others. And we also refer the Court to the testimony of F. A. Tracy, who says that even in the dry year of 1877 the water would have gone through to Tulare Lake, had it been permitted to have come down Kern River and not have been taken out by the canals. (T., II, fol. 1026.)

XII.

FINDING FORTY-THREE.

Again, we have simply the statement of counsel that the land of plaintiffs have not been, and will not be, irreparably or otherwise injured or ruined, in whole or in part, by the diversion or appropriation of water of Kern River by defendants. There is no reference whatever to any evidence in support of the finding, notwithstanding it was found as a fact (finding fifty-seven) that the Calloway Canal has a capacity to carry more than six hundred cubic feet of water per second, and notwithstanding it appears in evidence that at the time this case was on trial, the Calloway was carrying water to almost, if not quite, its full capacity (see testimony of E. M. Roberts, Transcript, Vol. II, fol. 279); and notwithstanding it appears by the testimony of Mr. Roberts, who has had charge of the head-gate of the Calloway Canal, that during the year 1877–8 and 9

the Calloway Canal took water from Kern River for about six months each year, and that during nearly all of such period of six months no water was running down Buena Vista Slough, or to plaintiffs' land on that slough. And it appears also by the testimony of Col. Mendell and J. D. Schuyler that the volume of water running in Kern River varies from twenty-five hundred to about four hundred feet per second.

XIII.

FINDINGS FORTY-FIVE AND FORTY-SIX.

These findings are simply referred to by counsel; but no evidence is referred to in support of either of them.

Exhibit "A," annexed to and made a part of the findings, shows that two sections of plaintiffs' land, at least, border upon Buena Vista Slough, which at that point appears to be a natural watercourse. (See also our reference to testimony in support of our objection to this finding on pages 408 and 409 of our first brief.)

XIV.

FINDING FORTY-SEVEN.

Our objection to this finding is also disposed of in the usual manner in which the counsel dispose of the most of our objections to these findings, by simply copying into their brief the finding, and then stating that it is supported by the evidence, without any reference whatever to any evidence to support any of the findings so copied.

XV.

FINDING FORTY-EIGHT.

This finding is disposed of in the same summary manner, by counsel for respondent. But this finding forty-eight is not a "finding of fact," but a mere conclusion of law.

XVI.

FINDING FORTY-NINE.

Counsel dispose of our objection to this "finding of fact," which is really a conclusion of law, by simply copying it into their brief (p. 239), saying it is supported by the evidence.

XVII.

FINDING SEVENTY-SIX.

This finding reads as follows:

76.

"That during the irrigation season of the year the "amount of water diverted from Kern River by defend- "ant is not sufficient to materially affect or substantially "diminish the volume or amount of water usually "reaching Buena Vista Slough; and that during the "balance of the year none of the water by defendant "diverted would, if not so diverted, ever, in its natural "flow, flow to or reach the said lands of plaintiffs, or "any part thereof."

This is certainly a remarkable finding. It will be as difficult for your Honors to even conceive of evidence that could be offered in support of it, as it is for counsel for defendant to find any in the record that warrants such a finding—and they do not even venture the statement that this finding is supported by evidence.

We can hardly imagine a stream of water that in a

day so *changes* in volume that, taking from it 600 cubic feet per second, will not materially diminish the flow of water down it, while the next day, taking that amount from it, none will be left to flow down the stream.

We shall refer to this finding again when we present our objections to the 79th finding.

(Also, see our first brief, pages 419 to 422, inclusive, where we have referred to the evidence of numerous witnesses in support of our objection to this finding that it is contrary to, and not supported by the evidence).

XVIII.

FINDING SEVENTY-SEVEN.

This finding counsel would also dispose of in this same summary manner by copying it into their brief (p. 240), and asserting that it is supported by the evidence, but no evidence is referred to in support of the finding. Every witness who testified in this case in relation to the flow of water in Kern River during the different years, testified that during the year 1878 there was an unusually large volume of water flowing in Kern River.

Tracy testified that there was a fair head of water flowing in the river in 1879. (T. II, fol. 1001). And he testifies that in 1878 there was as much water flowing in Kern River as there was in 1872. (T. II, fol. 1036). And all of the witnesses who testified to being on Buena Vista Slough during the year 1872 agree that during that whole year the water was flowing from Buena Vista Lake to Tulare Lake. See our first brief p. 390–1.

It would seem that the reason that your Honors are referred to no testimony in support of these findings

is that defendants' counsel think that plaintiff's objections to the finding in this case as not being supported by the evidence, were made in a mere spirit of contention, and not as possessing any real worth or intrinsic merit.

See page 240, respondent's brief.

This assertion of counsel for defendant will hardly excuse them from pointing out evidence to support findings so material to the defence, that if a single one of them is not supported by, but contrary to the evidence, the judgment of the lower Court in their favor must be reversed. The material findings in this case must be supported by something besides the statement of counsel that they deem the objection to such finding made by counsel for the appellant, were made in a mere spirit of contention.

Such a claim will not uphold the finding any more than the assertion that a certain finding is supported by the evidence, without referring the Court to any evidence in support of it.

In support of our objection to this finding, we call attention to the testimony of Mr. Roberts, who testified that in 1879 they were running more water in the Colloway canal than they were in 1877 and '78, and continues: "*I presume it would average* 2 *or* $2\frac{1}{2}$ *feet*" (T., II, fol. 277–8), and that it required a wing dam that year to force the water into the Calloway Canal. (Fol. 280.)

And on cross-examination he says.

"By Mr. Haggin. Q—You spoke of the water being
" in the Calloway Canal during the years 1877, '78, '79,
" '80 and '81; you said that in one year it contained so
" much, carried so much; in another year so much.
" What did you mean?—do you mean that it ran that
" way all the time throughout the year?
" A—No, sir; I don't mean to be understood that
" way; I think I said, during the irrigating season.

" Q—What is the irrigating season here?
289 " A—Well, there is considerable difference of opinion
" about that; my experience is that we have to irrigate
" here from—this season, especially, we commenced to
" irrigate in February.
" Q—Is not your irrigating season regulated by the
" supply of water in the river?
" A—Yes, sir.
" Q—You irrigate at a time when the water is high in
" the river?
" A—Yes, when the most water is in it.
" Q—*And the times you referred to when the Callo-*
" *way carried so much water, were times when the river was*
290 " *high?*
" A—*The river was high at times and low at times, dur-*
" *ing the times when we were carrying this.*
" Q—*Did you take much water when the river was*
" *low?*
" A—*Not to a very great extent; we to a great extent regu-*
" *lated it by the quantitg of water in the river; we did not*
" *take all there was in the river.*"

T., II, fols. 288–290.

And this witness testified that in 1879 the Calloway Canal commenced to take waters from the River in March and continued to take it until July or August (T., II, fol. 292–3), so that at least for one and a half months prior to the commencement of this suit the Calloway Canal was taking from Kern River a stream of water 80 feet wide on the bottom and from 2 to 2½ feet deep.

XIX.

FINDINGS THIRTY-THREE AND THIRTY-FOUR

In support of these findings, counsel refer to certain portions of Mr. Crocker's testimony, where he is testifying in relation to what part he took personally in the construction of the Kern Valley Water Company's Canal. But they fail to refer to the testimony of this witness, who was the only witness examined in relation to the expenditures made by the plaintiffs in connection with the workings of that company which were constructed to control and utilize the water that ran down Buena Vista Slough and use it upon the lands in suit. In support of our objection to these findings, we refer the Court to p. 405 of our first brief where the evidence given by Crocker is referred to, and we also refer the Court to Transcript 2, folios 734–735, where Mr. Crocker testifies that the fact that these lands were supplied with water, did enter into consideration with the plaintiffs when they made the purchase of the lands in 1870.

" Q—*In buying those lands which you and Miller &*
" *Lux own along Buena Vista Slough, and described in*
" *the amended complaint, did the fact that these lands*
" *were supplied with water enter into consideration when*
" *you made that purchase?*
" [*Defendants object to the question as irrevelant, and*
" *not tending to prove any of the issues in this case. Ob-*
735 " *jection overruled. Defendant excepts*].
" A--*It did.*"

T., II, fol. 734–5.

XX.

FINDING SIXTY-TWO.

The testimony referred to by counsel for respondents in support of their proposition that this finding is supported by the evidence, fails to justify such conclusion.

Counsel have not attempted to answer our objections to this finding, which appears on pages 35 to 50, inclusive, of our first brief. We do not think that it necessarily follows, as stated by counsel, that if the Calloway appropriation be in accordance with law—which we deny—that all other appropriators also comply with the law.

See pages 256–257, respondent's brief.

But on the contrary, by referring to our former brief, at the pages above indicated, we think this Court will see that not only the defendants in this case have failed to comply with the provisions of the Civil Code in relation to appropriation of water, but that every other canal company, the rights of which to the water were attempted to be put in evidence in this case, has also failed to comply with such provisions.

ERRORS OF LAW OCCURRING AT THE TRIAL AND EXCEPTED TO BY PLAINTIFFS.

Connsel for respondents in this case devote but twelve pages of their brief to these numerous errors complained of by us.

See respondent's brief, pages 264–265.

We think there is no occasion for repeating what we have said in our first brief in support of our assignments of error in so far as they attack the rulings of the Court, *first*, upon the motion made by us, to strike from the answer certain defences set up by the defendant; *second*, in admitting certain evidence

against our objections; *third*, in refusing to admit evidence offered by the plaintiffs in rebuttal; and *fourth* in striking out the evidence of plaintiff's witnesses given in rebuttal.

Our points and authorities in support of our objections to these rulings will be found on pages 3 to 102, inclusive of our first brief, and to that portion of our brief, we invite the attention of this Court.

XXI.

ELEVENTH FINDING.

This finding, as drawn by the counsel of defendant, and as originally signed, was in accord with the evidence of the witnesses of both the plaintiffs and defendant.

Counsel for defendant made no application to have it changed.

The Court, of its own motion, set this finding aside, and substituted one in its place, that is in conflict with the evidence of every witness who testified to going to Buena Vista Slough at the point where the middle branch of Kern River empties into it.

This we clearly show in our first brief (p. 397 to 400), and counsel for defendant do not attempt to gainsay it.

The only reference we find to this finding in their brief is on pp. 39 and 237, and on p. 44, when they simply copy the finding.

On p. 39, counsel for defendant, after referring to our specifications of insufficiency to twenty-nine findings, and among these, the 11th, say:

"It would occasion too much repetition, and tres-
" pass too much upon your Honor's patience, for us
" to answer, *seraitum*, each specific objection suggested
" by plaintiffs to these findings, which, by answer-

"ing the substance of their objections, we not only "support each fact found, but are enabled to treat "the questions involved in a more concise and logical "manner. We will refer, however, more specifically "to the several findings as occasion suggests."

But nowhere in their brief do they specifically refer to this finding, unless it be to copy it on p. 44 of their brief.

It will be seen that not a single witness, whose testimony defendant's counsel refer to, answer, as they say, the "substance" of our objections to twenty-nine findings, testified to going to Buena Vista Slough at the point where the middle branch of Kern River enters such slough.

This 11th finding, as changed by the Judge of the lower Court, does not seem to possess any particular attraction for counsel for defendant, it is a change too radical and too far removed from the facts established by the evidence contained in this record to suit even counsel for the party who had judgment in this case.

We call the special attention of this Court to our objections to this finding on pp. 397 to 400 of our first brief, and to the testimony of the numerous witnesses there referred to, which clearly shows that the finding, as drawn by defendant's counsel, and first signed, in so far as it found that the water of Kern River that ran into Buena Vista Slough from the middle branch, ran north after entering Buena Vista Slough, is in accord with and supported by the evidence, and that the finding substituted by the Judge of the lower Court, in place of the finding drawn by counsel, is contrary to all the evidence given in this case, in that regard.

The 11th finding, as drawn by counsel for defendant and first signed by Judge Brundage, found that the middle branch of Kern River emptied its waters into Buena Vista Slough on or about Section 30, T. 30 S.,

R. 25 E., "AND THENCE FLOWED NORTH-"ERLY INTO BUENA VISTA SWAMP." (T., I, fol. 368.) The finding, as changed by Judge Brundage, reads: "AND THENCE FLOW INTO BUENA "VISTA AND KERN LAKES." (T. I, fol. 497.)

That is making the water from such middle branch of Kern River flow south instead of north, after entering Buena Vista Slough.

XXII.

FIFTIETH FINDING.

"That except the said Buena Vista swamp, and ex-"cept the sixteenth (16th) and thirty-sixth (36th) sec-"tions in each township, which belong to the State of "California, all the lands delineated upon and em-"braced by the map hereto annexed, marked 'Exhibit "A,' are and always have been public lands of the "United States of America."

This is another finding that defendant's counsel are unable to refer this Court to any evidence tending to support it.

We, on p. 401 and 2 and p. 409, call special attention to this finding, and to the evidence of various witnesses who testified to the ownership of a vast number of sections of land outside of the swamp and overflowed land.

The only reference we find to this finding and the 23d, in so far as that finding finds that all of the land to irrigate which the defendant has diverted the water from Kern River are lands belonging to the United States of America, and that the United States is the owner of all the lands on both sides of Kern River, is on page 250 of their last brief filed, where they say:

"As to the ownership of the United States, we say "that the presumption of law is that the Government "owns all the lands, unless ownership is shown in "some one else, and there is no testimony in this

" case showing ownership in any one else, of any land
" outside of Buena Vista Swamp."

We think we have overcome this presumption, by showing by their own witnesses, not only that Haggin & Carr are in possession of nearly all the land along the Kern River, but that their tenants are in possession of all the land that is irrigated from the Calloway Canal, except a single section; and James and R. L. Dixon testified repeatedly, without objection being interposed by defendant's counsel, to the ownership of Mr. Haggin to large tracts of land along the Calloway and other canals.

We refer your Honors specially to our first Brief, pages 401–2, and page 409, in support of our claim that the twenty-third and fiftieth findings are clearly against the evidence.

Mr. R. L. Dixon, one of defendants' witnesses, and who has charge of one of the numerous ranches of Mr. Haggin, the Buena Vista Ranch, testified that he resided on Buena Vista Ranch and that the buildings were on Sec. 20, T. 30 S., R. 25 E. He goes on and gives the line of fence which surrounds the Buena Vista Ranch, which encloses Sections 19, 20 (he says the house is on the center of Section 20), 21, 27, 28, 29, 30, 31, 32, 33, and all of 34 except the northeast quarter. So it would seem that these ten and three-quarters sections are all under fence, and he says: "I
" took up my residence on the ranch about the middle
" of July, 1875, and have lived there ever since." (T., III, fol. 489–492.) And on cross-examination the witness says:

" Q—When did Mr. Haggin acquire that Buena Vista
" ranch?
" A—I think I delivered the possession of it to Mr.
568 " Haggin the 1st or 2d of July, 1877, and I have the
" management of it now, and working for Mr. Haggin,

" and have been ever since that time, and have superin-
" tended that property ever since.

T., III, fol. 567-8.

So it appears that Mr. Haggin has, since 1877, owned what is known as Buena Vista Ranch, and by looking at defendant's Exhibit "I" it will be seen that both the south and middle branches of Kern River, and also the Gage Slough, run through the Buena Vista Ranch. Still, we have this remarkable finding, that all of this land in the possession of Mr. Haggin since 1877, when Mr. Dixon says he acquired the title to it and all under fence, belongs to the Government of the United States.

And we also call attention to the testimony of several witnesses, who testified as to the land which is irrigated from the Calloway Canal.

JAMES says, speaking of the Calloway Canal:

"There are 13,000 acres of land being cultivated along
968 " that canal.
" Q—How much of that 13,000 acres is being culti-
" vated by the tenants of Haggin & Carr?
" A—I think most of it."

T. IV, fol. 968.

MACMURDO, after testifying to quite a number of parties cultivating land along the Calloway Canal, is asked:

"Q—Was all this occupied by the tenants of Haggin
" & Carr, that you have called off?
" A—All but Section 19. This Poso Creek settle-
" ment that I have referred to is composed of ranchers,
" people and family living there, having ranches there
1226 " and beyond Section 27.
" Q—Are those ranches occupied by tenants of Hag-
" gin & Carr?
" A—Some of them.
" Q—Nearly all, are they not?
" A—I don't know exactly how many are and how
" many are not. A good many of them are tenants of
" Haggin & Carr, a great many of them.

" Q—It is a settlement composed nearly wholly of the
" tenants of Haggin & Carr, isn't it?
" A—Well, there are a great many tenants of Haggin
1227 " & Carr; I don't know what proportion. I suppose
" more of them are his tenants than otherwise. There
" is a man by the name of Martin who is not a tenant;
" and Cox & Clarke had a ranch out there. That ranch
" is in the Poso settlement. I cannot recollect any one
" else just now. I could not say how many tenants
" Haggin & Carr have out there. There are several be-
" sides those whose names I have called, but I don't
" recall their names."

T. IV, f. 1225–7.

The following witnesses all lived on land near the Calloway Canal, and irrigated their land from it, and they all testify that they were tenants of Haggin & Carr:

Jacob Hays: Cultivating 800 acres (T. IV, f. 1421); and he says: Jacob McMillan had in about 650 acres; E. Manley the same, and Mr. Curry some 800 acres; Mr. Taylor about 750—all taking water from the Calloway (T. IV, f. 1422–3); and that they are all tenants of Haggin & Carr (T. IV, f. 1426). He says also: "That the company farmed themselves; I think they were farming themselves about 1400 acres." (T. IV, f. 1424.)

J. F. Creasey says he was a tenant of Haggin & Carr on land irrigated by the Calloway Canal (T. IV, f. 1429).

W. R. Neal says the same (T. IV, f. 1436).

We submit that when we show that 13,000 acres of land along the Calloway Canal, except one section, is in possession of Haggin & Carr, or of their tenants, and being cultivated by them, that the presumption is, that Haggin & Carr, and not the Government of the United States, own such land.

The proof that Haggin & Carr had actual possession of the land is *prima facia* evidence of title.

Kelley v. *Mack*, 49 Cal., 524;

C. C. P., Sec. 1963, Sub. 11 and 12.

A water case decided in New York is directly in point:

"Denio, J. The plaintiff's possession of the land "on which his brickyard was situated, and through "which the water course ran, was *prima facie* evidence "of ownership in him. As such owner he was pre-"sumptively entitled to have the stream run in its "natural channel, without obstruction or diversion. "It is true that when he went into possession he found "that the water had been diverted by the defendant's "dam above, and it is to be inferred that such diver-"version had been acquiesced in by the parties who "had preceded him in the possession, and such acqui-"escence was continued on his part until the com-"mencement of this action. But the whole period "during which the several successive proprietors fore-"bore to assert their right to have the water returned "to its natural channel, was not sufficient to raise the "presumption of a title so to divert it."

Haight v. *Price*, 21 N. Y., 244–5.

It will, in the face of this evidence, hardly be assumed that even Messrs. Haggin & Carr, who claim in the "6th answer" that they are diverting the water of Kern River, at an expense of some hundreds of thousands of dollars, for the purpose of benefiting the plaintiff's land, and making what is now a "pestilent and unwholesome country," "healthful and habitable," (T. I, f. 254–5); that they are doing all this just for the pleasure of irrigating some 13,000 or more acres of Government land.

We should rather think the sworn answer (Third, T. I, f. 210 to 230) stated the facts correctly, and that they are expending the money on the Calloway Canal simply with a view of making money out of it as a speculation.

XXIII.

The following are findings referred to in our first brief, claiming they were not supported by the testimony, but were all contrary thereto; counsel for defendant have failed to refer this Court to any evidence in support of any of them.

There are quite a number of them. We shall content ourselves by simply referring to the pages of our first brief where our objections to each finding appear:

To 7th	finding	on page	396.
9th	"	"	396–7.
33d	"	"	405.
34th	"	"	405.
37th	"	"	407.
40th	"	"	407.
62d	"	"	413.
68th & 69th	"	"	415.
73d & 74th	"	"	416–17.
75th	"	"	417–18–19.

XXIV.

SEVENTY-NINTH FINDING.

The last finding that we desire to specially call your Honor's attention to, and one that counsel for defendant have utterly failed to show is supported by any evidence, is one that we, in our first brief, devoted several pages to, and gave full reference to the evidence of numerous witnesses that was in direct conflict with the facts found.

On p. 387 of that brief we called attention to that portion of the findings which we claim is contrary to all the evidence given in this case. It reads:

> *"For more than ten years next preceding the com-*
> *"mencement of this action, none of said water has*
> *"flowed to Tulare Lake, save and except that in ex-*
> *"ceptional and rarely recurring years of excessive and*
> *"unusual rain and snow, a portion of said water has*
> *"flowed to and into Tulare Lake, following, however,*
> *"no defined channel over said swamp, but generally*
> *"spreading throughout the same and not constituting a*
> *"watercourse or regular flowing stream."*

And following pp. 388 to 396, we call attention to the evidence of a great number of witnesses who testify to the condition of the water in Buena Vista Slough for each year covered by that finding.

Defendant's counsel do not attempt to meet this, nor do they refer this Court to the evidence of a single witness who testified to facts in support of this finding, and for the very good reason that it cannot be found in the record in this case.

On page 39 of their brief they say:

"In the specifications of insufficiency, Nos. 3, 4, 5, "6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 26, 27, 33½, 35, 36, "37, 38, 39, 50, 51, 54, 55, 56, 62 and 63, objecting to "all or portions of findings 3, 4, 5, 7, 8, 9, 11, 12, 13, "14, 16, 17, 18, 30, 31, 40, 45, 46, 47, 48, 49, 65, 66,

" 70, 71, 72, 78 and 79, relating more or less to Buena
" Vista Slough and the flow of water to plaintiff's
" lands—plaintiffs contend, in substance, that Buena
" Vista Slough is a natural stream or watercourse,
" through which the water of Kern River, both before
" and after the flood of 1867–8, have been wont to flow
" through and along plaintiff's lands, to and into Tu-
" lare Lake; that the channel or channels of said
" slough are well-defined and continuous, and carry
" within their banks the usual and accustomed flow of
" the waters of said river.

" It would occasion too much repetition and tres-
" pass too much upon your Honor's patience for us to
" answer *seriatim* each specific objection suggested by
" plaintiffs to these findings; whilst, by answering the
" substance of their objections, we not only support
" each fact found, but are enabled to treat the ques-
" tions involved in a *more concise and logical* manner.
" We will refer, however, more specifically to the sev-
" eral findings as occasion suggests."

But in all the pages of their brief they do not refer your Honors to the evidence of a single witness where he testifies to the flow of water through Buena Vista Slough and into Tulare Lake during the ten years preceding the commencement of this action.

Still this case must turn on this very fact: has the water of Kern River, in its usual flow, run through the lands of plaintiff which lie along Buena Vista Slough and between Buena Vista and Tulare Lakes?

Had there been any such evidence in the record, counsel would surely have called attention to it. There is not, and in the nature of things could not be.

Their own witnesses, including their expert, Col. Mendell, all testify that the water of Kern River had but one course after the small lakes, Buena Vista and Kern, were filled, and that was down Buena Vista

Slough to or towards Tulare Lake, and Col. Mendell testifies that the river, when not at its height, carried 2500 cubic feet of water per second. When we consider the evidence given by defendant's own witnesses as regards the volume of water flowing in Kern River, this Court can only say that this 79th finding is a very remarkable one to be made in this case. And when it is considered with one other finding on this question of flow of water to plaintiff's lands which is in direct conflict with it, it will be seen that both cannot be true; in fact, neither are. The finding we refer to is the 76th:

"That, during the irrigation season of the year, the "amount of water diverted from Kern River by de- "fendant is not sufficient to materially effect of sub- "stantially diminish the volume or amount ef water "usually reaching Buena Vista Slough; and that, dur- "ing the balance of the year, none of the water by de- "fendant diverted would, if not so diverted, ever, in its "natural flow, flow to or reach the lands of plaintiffs, "or any part thereof."

The 79th finding is, in effect, that for ten years prior to the commencement of this suit none of the waters of Kern River flow to Tulare Lake, except that in exceptional and rarely-recurring years of excessive and unusual rain and snow, a portion of the water of Kern River has flowed to Tulare Lake.

The 76th finding is to the effect that the volume of water taken from the river by defendant, 600 cubic feet per second (59th finding), does not, during the irrigating season, materially affect or substantially diminish the volume of water usually reaching Buena Vista Slough.

The irrigating season is, by the Court, found to be from February to July (75th finding), so for five or six months the flow is so great in Kern River that 600 cubic feet per second can be taken from it and

not materially affect the flow to Buena Vista Slough. Still, by the 79th finding, the Court finds that, notwithstanding this enormous volume of water, so great that 600 cubic feet taken from it per second will not materially diminish its volume, that none of it will flow to Tulare Lake, except in rarely-recurring years, etc.

Again, this 76th finding finds:

1st. That during the irrigating season (from February to July) 600 cubic feet per second taken from the water flowing in Kern River will not materially affect the flow to Buena Vista Slough.

2d. That during the balance of the year, some six or seven months, none of such 600 feet would reach any of plaintiff's lands.

In other words, on the first and last day of the irrigating season, 600 cubic feet of water per second can be taken from Kern River and not affect the volume of water flowing into Buena Vista Slough; while on the last day before such season commences and the first day after it terminates, 600 feet taken from the river would take it all, so that none would be left to go to Buena Vista Slough and to plaintiff's lands. An absurdity, only equaled by the position taken by counsel for defendant, that a river carrying at least 2500 cubic feet of water per second, running in a well-defined channel until it reaches the south line of plaintiff's lands, that there it suddenly ends, and thereafter no channel can be found, although the fall of the country from the south line of plaintiff's lands to Tulare Lake is two feet per mile, or some six times greater than that of the Mississippi River from St. Louis to the sea (31-100 of a foot per mile).

We know of no better way of showing that this finding is contraray to the evidence than to quote from the brief of counsel for defendant. They say:

"If you prohibit the use of all those canals above "the swamp, if you insist upon the natural common "law flow of the water, undisturbed and undiminished, "on the swamp, *in the light of the evidence in this case, "as well as by common observation and knowledge, what "is the necessory and inevitable result? That in every "year, except exceptionally dry years, years of drought, "the whole of this swamp land, from one margin to the "other, and from Buena Vista Lake to Tulare Lake,* so "long as the inlet to Buena Vista Lake is stopped up, "will be covered over from side to side and from end "to end with water."

Pages 40 and 41 of defendants' argument and authorities.

This is just what we claim, and what we say the evidence in this case shows, and what common observation and knowledge teaches. And we claim that if the water of Buena Vista Slough is allowed to flow into Buena Vista Lake, it better regulates the flow down Buena Vista Slough, and the stream of water between the lakes continues to flow all or nearly all of the year, but only at times of extraordinary high water would the water overflow the banks of Buena Vista Slough and spread over the swamp and overflowed land.

In this connection we call the attention of the Court to another finding that counsel for defendant pass on in silence, one that we called special attention to in our first brief. It reads:

37.

"THAT THE WATERS OF KERN RIVER "RISE AMONGST THE HIGHEST MOUNTAINS "OF THE SIERRA NEVADA, WHERE THERE "IS AT TIMES A GREAT ACCUMULATION OF "SNOW; that at such times the melting of the snow "is liable to cause great and irresistible floods; that "the river bed below the foothills is shallow, and of "insufficient capacity in time of flood to carry off "the waters which then sweep over the adjacent "country; THAT SUCH ACCUMULATION OF "SNOW IS NOT USUAL OR ACCUSTOMED, BUT "IS ONLY OCCASIONAL AND IN RARELY RE-"CURRING YEARS."

This is certainly a very remarkable finding of fact for any Judge in California to sign, that in the "HIGHEST MOUNTAINS OF THE SIERRA "NEVADA" * * * THE "ACCUMULATION "OF SNOW IS NOT USUAL OR ACCUS-"TOMED, BUT IS ONLY OCCASIONAL, AND "IN RARELY RECURRING YEARS." (37th finding, T., I, fol. 396-7.)

Comment on such a finding of fact is unnecessary.

OUR FIRST BRIEF FILED.

In this brief we have carefully presented the evidence in support of our position, that the findings relating to Buena Vista Slough, which find that there is not a continuous channel from Buena Vista Lake to Tulare Lake, are all contrary to and not supported by the evidence.

This we did for the reason that, in our first brief, we gave but the substance of the testimony of the witnesses, not claiming to quote it word for word, and placing none of it in quotation marks, nor did we in that brief refer to the volume and folio of the record upon which the testimony could be found. These defects and omissions we supply in this brief, and it takes the

place of our first brief, in so far as these findings are reviewed in that brief; that is, from page 109 to page 285.

The first part of our first brief, to page 103, where we present our objection to the rulings of the Court in refusing to strike out certain portions of the answer of defendant, and where are presented our objections to numerous ruling of the Court, we have not in this brief reproduced, nor have we, except as to a very few of the rulings, added anything to our objections there presented. We therefore respectfully call attention to that portion of our first brief, and to the objections there made to the rulings of the lower Court. (Page 1 to 103.)

PHOTOGRAPHIC COPY OF MAPS 2 AND 3.

AND SHOWING CROSSINGS MADE BY DEFENDANTS' WITNESSES WHILE THIS CASE WAS ON TRIAL.

Your Honors will find annexed to this brief a photographic copy of a map of the tract of swamp land along Buena Vista Slough, and of the slough or channel through such tract of land, as they appear on the maps made by Mr. McCray, and in evidence (marked Maps 2 and 3). On this copy also appear the crossings made by the three parties sent out by defendants, while the case was on trial, to examine this body of swamp land, and also lines showing the two level lines run by Macmurdo and Fillebrown across the body of swamp land.

We have had this map photographed that your Honors may be able to see at just what points we claim the witnesses of defendant crossed the body of swamp land, (and we do not understand that we differ from counsel for defendant as to where the crossings were made), and that you may at a glance see the distances between the crossings, and also the miles upon miles

of Buena Vista Slough that defendant's witnesses never attempted to follow or cross, and that none of them testified in relation to.

The first party sent out by the defendant to cross this Buena Vista swamp land, consisted of M. F. Taylor, H. A. Jastro, Vining Barker and E. D. Cross.

The trip was made in two days (April 14 and 15, T. III, folio 623), starting from the Buena Vista Ranch on Section 20, T. 30 S., R. 25 E. (see map "I,"), or about eight or nine miles from Wible's Headquarters, going, as the witnesses say they did, round by the way of Cole's bridge; Taylor says Wible's Headquarters was twenty miles south of where they made the first crossing (T., III, fol. 385–6), and in the two days is included the return trip to the McClung Ranch (T., III, fol. 405–6.) So there must have been a drive of at least twenty-eight miles outside of the drive from the swamp land to the McClung Ranch, the location of which we do not think appears in this record, besides that made in the swamp land. So it can be seen how little time was left these witnesses to examine the swamp land and channels running through it.

The crossings made by M. F. Taylor, and Jastro, Barker and Cross, on this trip, are indicated on this photograph by the light dead line, thus _____ commencing on Section 31, T. 26 S., R. 22 E , on the west side of the swamp land, marked a and then running a short disance north, and thence east across the swamp land and across Sections 31 and 32 and into 33, in T. 26 S., R. 22 E. (first crossing made by this party); thence south to Round Corral; thence from the Round Corral north and along the margin of the swamp land to a point nearly due east from the Tule House; thence westerly to the Tule House, which is on Section 32, T. 25 S., R. 22 E.; thence southwesterly along the Tule House Slough and the slough running between that

slough and the slough on the west side of the swamp land to such slough on the west side (this was the second crossing made by these witnesses); thence southerly along that west side slough to the point on Section 31, T. 26 S., R. 22 E., where they had made the first crossing across the swamp land to the Round Corral; thence following the same course first taken across Sections 31, 32 and 33, T. 26 S., R. 22 E., and to the Round Corral; thence southerly along the west side of swamp and on high land, and again across the swamp land, crossing Sections 25 and 35 in T. 28 S., R. 22 E.; (third crossing); they then go south along the west line of the swamp land to the centre of Section 12, and thence east across Sections 12, T. 29 S., R. 22 E., and 8, 9 and 10, in T. 29 S., R. 23 E., to the east side (fourth crossing); and thence southeast along the margin of swamp land to the McClung Ranch.

The second party sent out by defendant consisted of M. F. Taylor, who was with the first party, and Walter James, C. G. Jackson, and J. D. Schuyler.

This trip was made also in two days—starting from Goose Lake, April 22 and 23, (T., III, fol. 406)—camping that night at the Tule House, and reached Sec. 10, opposite Bonestell's, on night of 23d. (T., III, fol. 442.)

The course of Taylor and Jackson, on this trip, is indicated on this photograph by the heavy dead line thus ——— commencing at "Round Corral," which is located at about the center of Section 3, T. 27 S., R. 22 E., and running north near the margin of swamp land to the Tule House; thence north along Buena Vista Slough into Section 20, T. 25 S., R. 22 E.; thence across Sections 20 and 19, in T. 25 S., R. 22 E., and Sections 24 and 23 in T. 25 S., R. 21 E. (first crossing made by them); thence northwest, some four miles; thence to "Mud" Slough, at a point on

Section 2, T. 25 S., R. 21 E.; thence along that slough north and south, and around the "laguna," and thence southeast to the Tule House Slough, and along the slough to the Tule House, where they camped for the night; thence along the Tule House Slough southwest and across the body of swamp land to the channel on the west side (second crossing), striking that channel on Section 13, T. 26 S., R. 21 E.; thence north along the channel of that slough some two or more miles, and returning and continuing south into Section 31, T. 26 S., R. 22 E., and thence east across the body of swamp land through Sections 31 and 32 and into Section 33, T. 26 S., R. 22 E. (third crossing), and south to the Round Corral again. This trip across Sections 31 and 32 and into Section 33 and to Round Corral, it will be seen, was in about the tracks of Taylor when he was on his first trip with Jastro, Baker and Cross. Thence south along the east margin of the swamp land to about the center of Section 10, T. 28 S., R. 22 E., where they cross the body of swamp land, and recrossed by about the same trail (fourth crossing); thence southeast, along the margin of the swamp land, to the southeast corner of Section 24, T. 28 S., R. 22 E., and thence southwest, diagonally, through Sections 25 and 35, in T. 28 S., R. 22 E., to the southeast corner of Section 34 (fifth crossing; thence along the west margin of the swamp land to about the center of Section 12, in T. 29 S., R. 22 E., and thence east across to the swamp land, through Section 12, T. 29 S., R. 22 E., and Sections 8, 9 and 10, T. 29 S., R. 23 E. (sixth crossing); this was on the same line that Taylor crossed these Sections with Jastro, Barker and Cross; and thence southeast along margin of swamp land and back home.

This route, so far as crossings are concerned, is the same as taken by the other two parties who made up this party of four, James and Schuyler, except that

they say they made the second crossing going southwest from the Tule House so as to come out on Section 1, T. 26 S., R. 21 E., instead of on Section 13, T. 26 S., R. 21 E., where Taylor says he and Jackson came out. But this difference is not material, as they all testified that they went from the slough at the Tule House, and which ran north and south from it, and that they found a slough rnnning across from the east slough, and they all found a slough or channel on the west side of the swamp land and of about the same length—from three to five miles.

The third party sent out by defendant it will be seen was again in charge of M. F. Taylor. This trip is again from Round Corral, and again but two days are devoted to the examination, and the swamp and overflowed land is crossed at but two points.

The crossings made by Taylor and others on the third trip appear on the photograph by a light dead line running across the body of swamp land and out into the high land, and are marked in Roman figures I, II.

They crossed but twice; attempted to cross a third time and found it "boggy" and turned backwards. Their guide, Will, says they found a slough and turned back. (T., V, f. 213-216.)

The first crossing was from east to west across Sections 8, 9, 10, T. 27 S., R. 22 E., and back in about the same line.

The second crossing, diagonally across Sections 25 and 35, T. 28 S., R. 22 E., and in about the same line as crossed by the party consisting of Taylor, James, Jackson and Schuyler. They returned on about the same course.

We do not place on this diagram a line showing the course of this third party when going along the margin of

the swamp and overflowed land from Round Corral, the starting point, as they were outside of the swamp land or on its margin, where plaintiffs have never claimed there were channels.

A glance at this photograph will show your Honors that the crossings made by defendants' witnesses were miles apart. (See ante p. 300 where we give the distances between the different crossings). It will further show that the witnesses for defendants were confining themselves to a few given points and not crossing at new points; but rather following in the footsteps of those who had gone before them, and it will show that their most southerly crossing—except the level line run by Macmurdo and Fillebrown across from the SE. corner of Sec. 28, T. 29 S., R. 24 E., and across Sec. 33, T. 29 S., R. 24 E., and Sec. 4 and into Sec. 9, T. 30 S., R. 24 E., where they found a well-defined slough from 60 to 100 feet wide and 4 feet deep, was at least 12 miles north from the most southerly line of plaintiffs' lands.

This level line run from the SE. corner of Sec. 28, T. 29 S., R. 24 E., we place on this photograph in red. See the line as drawn by Mr. Macmurdo on Map "B."

On this diagram, the first level line run by Macmurdo and Fillebrown across the body of swamp land was across Secs. 7, 8 and 9, T. 29 S., R. 23 E., and to the center of Sec. 12, T. 29 S., R. 22 E., and is shown on this map by a dotted or broken line, thus: _ _ _ — — — — It will be seen that this line was run at a point where Taylor had crossed with the two first parties sent out to cross the body of swamp and overflowed land.

We have colored red the land described in the amended complaint, to show what channels we claim run through plaintiffs' land.

We respectfully ask that your Honors will place

this map before you when you read the testimony of the different witnesses in relation to the channel at the Tule House, and running north and south from it; and the cross channel running from the east channel to a channel on the west side of the swamp land, which west channel they say continues both north and south for miles from where the cross channel connects with it.

This testimony will be found fully set out on pages 231 to 276, *ante.*

Also, that this diagram be consulted when reading the testimony of the witnesses, James, Taylor and Jackson, when they describe "Mud" Slough, in T. 25 S., R. 22 E., pages 282 to 286, inclusive.

Then turn to Exhibit "A," annexed to the findings, in which the Court finds that—

> ***"The sloughs and lakes in said complaint mentioned "* * * *are correctly and fully shown and de- "lineated."*** (18th finding.)

And see if a trace of the channel at and north, south and west of the Tule House can be found, and see if your Honors do not look in vain for "Mud" Slough, although all those channels are described by the numerous witnesses of defendant as well-defined and continuous.

For a full reference to the testimony of defendant's witnesses as to the crossing of Buena Vista Slough on those several trips see pages 346 to 368 of our first brief.

ARGUMENTS and AUTHORITIES.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX, ET AL.,
Plaintiffs and Appellants,
vs.
JAMES B. HAGGIN,
THE KERN RIVER LAND
AND CANAL COMPANY,
Defendants and Respondents.

Brief for Appellants.

[The only defendant at present in this case is the Kern River Land and Canal Company.]

STATEMENT OF CASE.

The plaintiffs in this action are Henry Miller, Charles Lux, James C. Crocker, who admittedly own some forty thousand acres of land along

Buena Vista slough, a watercourse which plaintiffs claim is the continuation of Kern river.

The defendant is the Kern River Land and Canal Company, and the object of the suit is to enjoin the said defendant from appropriating the waters of Kern river and diverting their flow through and along Buena Vista slough.

The claim of the plaintiffs is founded upon their right as riparian owners of the land bordering upon Buena Vista slough, and they claim that as such riparian owners they are entitled to have the waters of Kern river flow through and along said Buena Vista slough, as they were wont to flow before their diversion by defendant.

Various defenses have been interposed by the defendant, but the principal contention of the defendant is :—

First. That it has a right to the waters of Kern river superior to that of the plaintiffs, by virtue of an appropriation of said waters anterior to the accruing of plaintiffs' title to any land along the borders of Buena Vista slough.

Second. That Buena Vista slough is not a watercourse, and that plaintiffs are not riparian owners of land along the borders of said slough.

The alleged superior justice of the doctrine of appropriation.

The defendant dilates largely upon the great justice, and the superior justice, of the doctrine of appropriation of water over the doctrine of rip-

arian rights. We are perfectly willing to meet the defendant upon that ground.

What is this case?

In the first place, there is a great talk of public interests, of the destruction which will ensue from a decision unfavorable to defendant. This is a private contest. On the one hand the plaintiffs are Lux, Miller and Crocker; on the other the defendant is the Kern River Land and Canal Company, the incorporeal representative of James B. Haggin and William B. Carr.

Miller and Lux and Crocker go to the State of California and buy 39,750 acres of land in this swamp land district in Kern county, and they pay for it $39,750, according to the laws of this State.

They acquire an absolute and indefeasible title to this property; they own it as absolutely as a man can own property; they own it to its full height and to its full depth; *usque ad cælum, usque ad orcum;* they own everything on it; they own the trees, and they own the stones, and they own the water. They own everything that a fee simple owner can grant; they own everything that a fee simple grantee can take; and that title stands here undenied and unimpeached.

That is the corner-stone of plaintiffs' case, their title to these lands; which title, and the location of these lands in this swamp land district, and the fact that they are swamp and overflowed lands, are distinctly found by the Court in favor of the plaintiffs.

Finding I: "That the plaintiffs are the owners "of the lands in Schedule M, attached to their

" amended complaint, described and acquired their
" title thereto as and at the times hereinafter set
" forth:

" That on the 18th day of January, 1876, there
" was granted to the plaintiffs, Miller, Lux and
" Crocker, by letters patent by the State of Cali-
" fornia, the following described portion of said
" lands:"

[Then follows a description of a certain portion of the lands claimed by plaintiffs.]

" That on the 17th day of February, 1876, there
" was granted to the plaintiffs, Miller, and Lux,
" by letters patent by the State of California, the
" following described portion of said lands."

[Then follows a description of another portion of the lands claimed by plaintiffs.]

" That on the 11th day of September, 1876,
" there was granted to the plaintiffs, Miller and
" Lux, by letters patent by the State of California,
" the following described portion of said lands."

[Then follows a description of another portion of the lands claimed by plaintiffs.]

" That on the 14th day of June, 1877, there
" was granted to the plaintiffs, Miller and Lux, by
" letters patent by the State of California, the fol-
" lowing described portion of said lands."

[Then follows a description of another portion of the lands claimed by plaintiffs.]

" That under and in pursuance of a statute of
" this State, to-wit: the Act entitled ' An Act to
" provide for determining the rights of parties in
" certain swamp and overflowed lands in Fresno
" and Kern counties,' approved March 20th,

" 1878, it was in the case of *People* vs. *Center et* " *al.*, in the late District Court of the Twelfth Ju- " dicial District, in and for the City and County of " San Francisco, State of California, by a decree " of said court filed the 17th day of September, " A. D. 1878, ordered, adjudged and decreed that " Miller, Lux and Crocker, the plaintiffs herein, " have judgment and are entitled to a patent, as " in said Act provided, for the following portion " of said lands."

[Here follows a description of another portion of the lands claimed by plaintiffs.]

Record, Vol. 1, pp. 83, 84, 85, 86, 87.

It appears by the testimony that for many years, and in fact as far back as the history of the country goes, this particular swamp land district has been especially valuable for the purposes of stock raising and hog breeding. We will not allude to the testimony upon this subject of the witnesses for plaintiffs, but we will take the description given by Mr. J. P. Murray, a witness for the defendants, as to the value of this swamp land district for these particular purposes, and how largely it has been appreciated by all stockmen and breeders of hogs for these purposes for the last fifteen years.

J. P. Murray; " I have been in the stock " business since 1852. I have been in Mariposa " County and Tulare County. I live in Tulare. " I have been in the stock business, in what is now " Kern County, from Tulare lake south. My " cattle ranged all over the island here, and around

" Kern and Buena Vista lakes, and from Tulare
" lake to those points. I brought cattle here first
" in 1864.

Record, Vol. 4, fol. 1496.

Speaking of the year 1864, and of this swamp land district, Mr. Murray says: " There
" were a lot of cattle there. The country seemed
" to be full of them. I don't know how many.
" They drove them in from Santa Barbara and
" San Luis Obispo, and all over the country, from
" Santa Clara, Santa Clara and Tulare, every place
" they had cattle they drove them in onto these
" tules and salt grass to save them, because it was
" a very dry year. That country, all the way from
" Tulare lake up to Buena Vista and Kern lakes,
" and to Bakersfield, was full of cattle. Almost
" every man who had cattle in the country in any
" direction, drove them in there, to save them.
" Dan Murphy had cattle there, Mr. Hawkins, Pat
" Murphy, from San Luis Obispo; I forget the
" names of the others now. Every man that had
" cattle in the country had to drive them there, to
" save them. I could not tell how many head of
" cattle were in there. I should think perhaps
" thirty-five or forty thousand, probably more.
" Temple had a great many cattle there."

Record, Vol. 4, fols. 1500, 1501.

Speaking then generally of this swamp land district, outside of that special dry year, 1864, Murray says:

"Q. During that year, 1869, what other people "besides Mr. Crocker, had cattle through there— "the country you have spoken of?

"A. Well, everybody had cattle there. In "1869 I was working all the way up from Tulare "lake towards Buena Vista lake and Kern "lake, and upon the river, and during the year "1869. I was all over the country a great "portion of the year; that was my business; I "had nothing else to do; I was there in spring, "summer and fall. I saw no stakes there that "year to mark the boundaries. I noticed lots of "brands that year in the country. They were all "through here, clear from King's river. Tom "Fowler had cattle there from King's river. I "don't know how many brands there were about "there in 1869–70. There were a great many "cattle near in the country. I think during the "years 1869, '70 and '71, there were probably 40,- "000 or 50,000 cattle there, or more. Pat "Murphy had cattle there; Mr. Jones, I think; "Crocker had cattle there; and Miller, and Cox "and Clarke, I mean Henry Miller, or Lux & "Miller, and Lynch, and Fowler, and Blakenship, "Bacon, and one or two or three of his boys. I "don't know exactly how many I had there; I "never counted them."

Record, Vol. 4, fols. 1503–1504–1505.

Then we find, in reference to hog dealers, that Jesse Dover, M. Norton, F. M. Epperly, T. W. Barnes, have been living in that swamp district for years, some of them as far back as 1870, en-

gaged in raising large bands of hogs. The value of these lands, and the general appreciation of their value is shown in the history of the country for the last fifteen years.

Now, why is it, and what is it, that makes these swamp district lands so valuable, that, particularly in dry years, all the neighboring stockmen drive thither their cattle? It is because Kern river, bursting forth from the mountains to the northwest of Bakersfield, and running down with an abundant flow of water in the early spring, fills Buena Vista slough, and fills Kern and Buena Vista lakes, and because the waters of Buena Vista slough run from Buena Vista lake to Tulare lake through this narrow swamp land district, a distance of from three to five miles in width. It is this slough of fifty miles length which gives this swamp district all its verdure and all its vitality. No one pretends to deny this fact. The practice of the last fifteen years proves it. All the great stockraisers of the country attest it—Lux and Miller, the great stockraisers of San Francisco; Cox and Clarke, the great stockmen of Sacramento, and various others.

If we may be allowed to compare small things with great, to this swamp land district, through and by the annual flow of the Kern river, coming profusely down, as it does in the early spring, the same amount of vitality, the same amount, not perhaps of value, but the same amount of proportionate value, is brought as the Nile brings to the thirsty land of Egypt. Without the Nile, Egypt is a rainless desert; the water of that river

is her life. Without this water of Kern river, as the testimony shows, these swamp district lands are worthless for all purposes of stock raising, worthless for all purposes of cattle of any kind, worthless for all prospective agricultural value. The whole contest here is just this: Shall this defendant, and the individual parties interested with this defendant, succeed in their speculation of carrying the water of Kern river from its appropriate natural channel, where God and nature have placed it, and carry it thirty miles off to make a garden of what nature has made a desert, and to make a desert of plaintiffs' swamp land, which nature has enriched with this plentiful affluent, pouring down annually from the mountains? That is the question. By what right, by what reason, shall men, who own this land and who own this water, be deprived, by a simple notice of appropriation placed at some point along Kern river, for which not one dollar was paid, of property for which they, the plaintiffs, have paid the State forty thousand dollars?

Miller & Lux were cattle men. They appreciated this swamp district. The testimony shows, and the testimony of the defendant shows, that for years and years they had been having their cattle in this swamp land district. Murray says, in 1864, '69 and '70 they had cattle there, and at a much earlier date. No men knew better or more fully appreciated than the plaintiffs, the value of these waters in connection with this land, and when they step forward and honestly acquire from the State and pay for this land, we are told

that because they desire to have this land, so purchased, with the water, which belongs thereto, that their claims are outrageous and extravagant, and that such claims are entitled to no consideration from a Court of Equity. And why? Because otherwise this desert land speculation of Haggin and Carr would prove a failure. That is the beginning and middle and end of the whole argument.

Speaking of what a man acquires when he buys land, the Supreme Court of Connecticut say:

"Every proprietor of land, through which a "natural water-course runs, has an equal right to "the use of the water for every useful purpose "to which it can be applied, as it is wont to run, "*without dimunition or alteration.* This right is "not an easement or appurtenance, but is insep-"arably annexed to the soil, and is parcel of the "land itself."

Wadsworth vs. *Tillotson*, 15 Conn., 372.

The Supreme Court of Ohio say:

"The uses of the waters of private streams be-"long to the owners of the lands over which they "flow. They are as much individual property as "the stones upon the soil."

Buckingham vs. *Smith*, 10 Ohio, 297.

Angell, in his work on Water Courses, 6 Edition, Section 5, says:

"The right of private property in a water "course is derived as a corporeal right, or hered-

" itament, from, or is embraced by, the owner-
" ship of the soil, over which it naturally passes."

In *Gardner* vs. *Newburgh*, 2 Johnson's Chancery, 165, Chancellor Kent says:

" A right to a stream of water is as sacred as
" the right to the soil over which it flows. It is
" a part of the freehold of which no man can be
" dis-seized, but by the lawful judgment of his
" peers, or by due process of law."

This Court, in *Parkes Canal and Mining Company* vs. *Hoyt*, 57 Cal., 46, say:

" The stream as yet flows in its natural course—
" *a part of the realty.*"

St. Helena Water Co. vs, *Forbes*, 10 Pac. Coast Law Journal, 532–533:

" It is sufficiently obvious, we think, that the
" property in question comes within the category of
" real property. 'The rights of riparian proprie-
" tors,' says Mr. Washburn in his work on Ease-
" ments and Servitudes, pp. 276–7 (215), 'though
" coming under the head of what are called
" Natural Easements, are not, in fact, the result
" of any supposed grant, evidenced by long ac-
" quiescence on the part of a superior proprietor
" of the flow of the water from his land to the
" land below. The right of enjoying this flow
" without disturbance or interruption by any
" other proprietor is one *jure naturæ*, and is an
" incident of property in the land, not an appur-
" tenance to it, like the right he has to enjoy the

" soil itself, in its natural state, unaffected by the
" tortious acts of a neighboring land owner.'

" 'It is inseparably annexed to the soil, and
" passes with it, not as an easement nor as an ap-
" purtenance, but as *parcel*,' said Chief Justice
" Shaw, in *Johnson* vs. *Jordan*, 2 Metc., 234.
" (See also Angell on Water-Courses, Sec. 141 :
" *Brase* vs. *Yale*, 10 Allen, 443, Civil Code, Secs.
" 14, 658, 662.)'

" *The water, therefore, that runs over the de-*
" *fendant's land, is a part and parcel of his land.*"

The fact that this swamp land was granted by the State, in no degree and to no extent modifies the rights of the grantee. A patent from the State, as a general proposition, conveys the water or water-course, just as thoroughly and completely as a grant from an individual proprietor.

In Angell on Water Courses, 6th edition, section 6, he uses this language:

" In this country a grant by a State conveying
" a tract of territory carries with it a right of
" property in all the watercourses within the
" boundaries of the grant. A patent from the
" State of New York, conveying territory twenty-
" four miles in width on the Hudson river above
" tide-water, with the territory described as lying
" and being in and upon the banks of the Hudson
" river, includes the soil under the river so far as
" the patent extends up and down the river."

What is the case of the defendants? On the 4th of May, 1875, O. P. Calloway and his fifteen associates made and recorded a notice of appropriation, which contained the following:

"Notice: We, the undersigned, claim the water "flowing in Kern river, Kern county, State of "California, to the extent of 74,000 inches, meas-"ured under a four-inch pressure, for irrigating, "manufacturing, commercial and mining pur-"poses; for use along the route of the ditch or "canal hereinafter described; said amount of "water to be diverted from said Kern river at "two certain points."

The notice then describes a point 300 feet above the railroad bridge, and another point about 150 feet below said railroad bridge. The notice then proceeds:

"Said water to be conveyed in a main ditch or "canal in the said described McCaffrey slough, "said slough to be enlarged, deepened and widened "for that purpose 120 feet on the bottom and four "feet deep, with a slope of one to one; * * * "distance of two miles and a half, more or less. "Thence in a ditch or canal 100 feet wide and "four feet deep, with a slope of one to one in a "southwesterly course two miles and a half; thence "in a northwesterly course to and into Tulare "lake, 30 miles, more or less.

Record, Vol. 4, pp. 8–9.

It will be observed that this notice reads, "for "manufacturing, commercial and mining purposes."

Now, there is no evidence that mining has ever been conducted in the neighborhood of Bakersfield. It is strictly a stock raising and agricultural country, and the statement in this notice of appropriation, that this water was taken up for mining purposes, is not true in fact, for it is devoted entirely to the irrigation of lands.

By this notice of appropriation, this paper, it is claimed that the appropriators who subscribed said notice acquired 74,000 cubic inches of water, under a four-inch pressure, of this river.

Now, 74,000 cubic inches of water is one thing, and 74,000 cubic inches of water under a four-inch pressure is a very different thing. We are told by Mr. Schussler that 74,000 cubic inches under a four-inch pressure equals 1600 cubic feet per second, and Professor Davidson says it equals about 1700 cubic feet per second. The matter is one of mathematical calculation. It is quite manifest that 1600 or 1700 cubic feet per second would take, for a very large part of the year, all of the waters of Kern river.

This suit was brought on the 12th of May, 1879. The water should, in ordinary course, have come down the river to Buena Vista slough in the early spring. But according to the testimony of Mr. Wible, it never appeared in Buena Vista slough until the 10th of June, 1879, and then a diminished flow of water appeared, and it lasted only 20 days. This was clearly caused by the appropriation of water through the Calloway Canal.

Mr. Wible says:

"Q. What was the condition of the water in "that slough at the time the suit was commenced "on the 12th of May, 1879?

"A. There was a little. I can explain that about "the water going there on or about the 1st to the "4th of April. That was one of those little "spurts. The water just came down and ceased "flowing.

"Q. How long did it flow about the 1st or 4th "of April?

"A. Well, it flowed probably two or three "days and then ceased, and commenced to flow "again about the 10th of June, and continued "until July, *and then ceased.*

"Q. When did it commence to flow again "from the river into Buena Vista slough after "July, 1879.

"A. I think it came in December, 1879."

Record, Vol. 2, fols. 1816–1817.

The Calloway party having filed their notice of appropriation, conveyed their rights under this notice to the defendant, the Kern River Land and Canal Company.

Now, the great equity which fires the soul of counsel for the defendant is, that the Calloway party went through the laborious process of posting up a bit of paper, a notice, on May 4th, 1875, declaring that they had appropriated substantially all the water of Kern river; and it seems to his mind the grossest injustice that the men who own property on both sides of Kern river below the head-gate of Calloway Canal, and

the various proprietors who own land on both sides of Buena Vista slough, also riparian proprietors—it seems to him the grossest injustice that they don't quietly submit to have all the waters of that river, for which they have all paid (and recollect that that swamp land district has 200,000 acres of land, for which the State must have received $200,000), sacrificed and confiscated, because, forsooth, Mr. Calloway and his associates, put up a notice of appropriation.

Of those 200,000 acres of land in the swamp land district the plaintiffs own 39,750. There are many other proprietors in this swamp district.

It has been a favorite figure of counsel for defendant in the course of this litigation, that the plaintiffs were sitting down at a point where Kern river discharged into Buena Vista slough, "like dogs in a manger, seeking to levy tribute "on all the supra proprietors of this stream." Now plaintiffs occupy no such position. They recognize the rights of the riparian proprietors on both sides of Kern river. They recognize the rights of the riparian proprietors along both banks of Buena Vista slough; but as against an appropriator, who goes to a point just north of Bakersfield to divert this river; not only as against the plaintiff, but as against all the riparian proprietors of Kern river, from Bakersfield down to Buena Vista slough, a distance of over twenty-two miles; and as against all of the riparian proprietors along both sides of Buena Vista slough, the plaintiffs do protest against this appropriation.

The maps of McCray, which are in evidence, show that there are about nineteen sections of land bordering on the right, or north-west bank, of Kern river, and the same number of sections bordering upon the left, or south-east bank, between the head gate of the Calloway canal and Buena Vista slough. The distance from the head gate of the Calloway canal to Buena Vista slough is over twenty miles. The idea is, that this Calloway notice of appropriation cuts off the riparian rights of all proprietors on both sides of this river, and on both banks of this slough.

We have been speaking of the main channel of New river. Then take Old river. The maps show that on Old river, on the right bank, there are twenty one sections of land touching the right bank, and eighteen sections touching the left bank, making thirty-nine sections. According to the doctrine asserted by the defendants, they will all be cut off from their riparian rights. Then take Buena Vista slough. For a distance of forty miles it runs through this swamp land district, and on each side of it there are riparian proprietors—eighty miles of frontage along Buena Vista slough, that also is to be sacrificed to this appropriator. And all this is to be accomplished by and through the notice which Calloway puts up, on the fourth of May, 1875, claiming substantially the great bulk of the waters of Kern river, by appropriation.

This, defendant says, was the first appropriation. And the great equity he claims is, first in time, first in right.

Now we cannot perceive or recognize the great justice of this kind of appropriation. It looks like a sacrifice of the rights of the many to the selfishness of the few. It deprives Kern river of all its riparian rights below the Calloway head gate. It deprives Buena Vista slough of all its riparian rights. And it carries all the waters of Kern river to feed and supply the speculation of this defendant, or of the individuals connected with this defendant, in their purchase of desert lands. It has no merit of any kind or character; for, strange to say, the very same termini which nature has affixed to this river and slough are the very same termini which this notice of appropriation claims. The notice of appropriation claims to carry these waters of Kern river from the point of diverson, just north of Bakersfield, where? To Tulare lake! And that is just the point and just the termination to which nature has carried them—only by a different route. The Calloway party talk of being the first appropriators. We think we may say that nature appropriated these waters long before California was settled; she fixed the appropriation by the physical features of the country—by the grades, by the levels, by the steep descent from Bakersfield along the course of Kern river, by Buena Vista slough, by the grade from Buena Vista lake to lake Tulare, forming, as Prof. Davidson says, part of the great water system of this country. The first branch of that system coming down from Shasta through the valley of the Sacramento, flowing in a southwest direction, until it comes to Suisun Bay; and the other part

of that drainage system, coming in this direction, through Lake Tulare, and passing to the San Joaquin river; both the Sacramento and the San Joaquin discharging almost together into the same bay, and their united waters then discharging through Suisun, San Pablo and San Francisco bays into the ocean. That is the appropriation which nature has made. There is no possible advantage; there is no possible benefit; there is no possible justice; there is no possible ground of public policy; why these waters should be diverted to this desert land, thirty miles from the natural channel in which God has appointed them to flow.

The whole question is this: Shall this river and this flow of water be left as nature left it? Shall the plaintiffs, the purchasers from the State, have some benefit from the purchase money which they have paid, or shall a third party, by filing a notice of appropriation, deprive this large swamp land district of all its water, and render it as valueless as those lands which the individuals represented by defendants have purchased as desert lands? That is the simple question.

Where, under the circumstances, is the greater justice; where the greater equity in the doctrine of prior appropriation over the doctrine of riparian ownership? On the contrary, in every system of law that we have ever known or heard of, whether it be the civil law, or the Spanish or the French law, branches of the civil law, or the common law, the doctrine of riparian right prevails in one and all of them. It prevails in Spain; it prevails in France;

it is distinctly expressed in the Code Napoleon; it prevails in Louisiana; it prevails in England; and it prevails in every State of the United States, except Colorado, which, by its Constitution of 1876, adopted a special system as to the appropriation of water.

In the argument of this case in the Court below—and that was really quite as imaginative as any part of the defendant's case—there was a great deal said by defendant's counsel about the great and flourishing districts which were going to be ruined in case this decision went against the defendant.

In that argument defendant's counsel said: "No "matter during how many years since the passage "of this swamp and overflowed Land Act in "1850 these communities have grown up, and "toiled and worked, and made and built houses, "and homes upon these desert wastes. There is "no statute of limitations which can be invoked "to ptotect them; no principles of law which can "be invoked to protect them, but widespread and "indiscriminate ruin must await them; and those "who have succeeded them in their years of toil "and thrift and endeavor; at the instance, and at "the suit of any man who has succeeded in buy-"ing at a nominal price the land along at the "outlet of this stream, who has lain by for years, "and seen these communities grow up and these "expenditures made without objection or protest."

We presume the same argument will be pressed before this Court. The evidence in this case

shows how entirely imaginative this claim is. At the time plaintiffs commenced this suit there was one settler in his own right on the Calloway, and three tenants of Haggin & Carr.

The testimony upon this point is as follows :

Frederick Steinman, a witness for the defendant, speaking of the time that he settled along the Calloway Canal, says :

" About December, 1877, I went over to live " as the tenant of Haggin and Carr."

Record I., Vol. 4, fols. 397–398.

" Q. How many tenants were there in 1878 " taking water from the Calloway, between your- " self and the river, the first year that you went " there ?

" A. There was three. There was a man by " the name of Smith, and a tenant by the name " of Garner, and myself."

Record, Vol. 4, fol. 404.

Daniel Wagoner, a witness for defendant, speaking of his residence on lands bounding on the Calloway canal, says :

" I lived on section 8, township 29, range 27, " in January and February, 1877 ; part of the " time I was living on section 8, and part of the " time on section 6 ; in 1876 I was living on sec- " tion 8."

Record, Vol. 4, fols. 794, 795.

It does not appear whether or not Mr. Wagoner was a tenant of Haggin & Carr's; therefore we may consider him as a settler along the Calloway canal in his own individual right at the time of the commencement of this suit.

Jacob Hays, a witness for defendant, says, speaking of his living on lands bounded by the Calloway:

"I have lived there since the middle of Au-
"gust, 1879, at that place on that section. I
"have known the Calloway canal since the latter
"part of January, 1879."

Record, Vol. 4, fols. 1417, 1418.

"Cross-examination:
"Q. Are you farming on that canal?
"A. Yes, sir; a tenant of Haggin & Carr."

Record, Vol. 4, fol. 1421.

That is, Mr. Hays settles along the Calloway four months after this suit is brought, and he settles there as the tenant of Haggin & Carr.

Mr. Hays mentions Jacob McMillan, J. G. Taylor, J. F. Creasy and Mr. Neal as taking water from the Calloway canal in 1879.

Record, Vol. 4, fol. 1423.

And on re-cross-examination Mr. Hays says:

"Q. Were all those persons you have named
"tenants of Haggin & Carr?
"A. Yes, sir; they were all tenants of Hag-
"gin & Carr."

Record, Vol. 4, fol. 1426.

Mr. Hays further says :

" Q. These tenants got no water from that " canal prior to June, 1879, did they ?

" A. No, sir ; I think not,"

Record, Vol. 4, fol. 1425.

J. F. Creasy, a witness for defendant, testifies :

" Q. You are a tenant of Haggin and Carr, are " you not ?

" A. Yes, sir.

" Q. What time did you go there in 1879 ?

" A. May, 1879. I think it was on the 14th " of May I got there and commenced work."

Record, Vol. 4, folio 1429.

That is, Mr. Creasy makes his settlement upon the Calloway lands two days after this suit was brought, and he makes that settlement as a tenant of Haggin & Carr.

W. R. Neal, a witness for the defendant, testifies :

" I live in Kern County, on the north side of " Poso creek, a very short distance from the Callo- " way Canal—on Section 26, I think, Township " 26, Range 25, if I remember right. I moved " there in August, 1879. I first became acquainted " with the Calloway Canal in the spring of 1879— " April, sometime."

Record, Vol. 4, folios 1431–1432.

That is, Mr. Neal went to the north side of Poso creek, and made his settlement in August,

1879, as a tenant of Haggin & Carr, three months after this suit was brought.

" I am a tenant of Haggin & Carr."

Record, Vol. 4, folio 1436.

So, that, instead of great and flourishing communities existing along the Calloway Canal at the time this action was commenced, there really was but one settler there in his individual right, namely, Daniel Wagoner, and three tenants of Haggin & Carr.

In this connection it may be well to show that the Kern River Land and Canal Company is nothing more than the incorporeal representative of James B. Haggin and William B. Carr.

W. B. Carr, speaking of the Kern River Land and Canal Company, says :

" Q. Don't Mr. J. B. Haggin and yourself have " control of that corporation ; and haven't you had " management and control of it ever since its or- " ganization ?

" A. I suppose we controlled it.

" Q. And have you during all that time ?

" A. Yes, sir.

" Q. Mr. Carr, was the construction of the " wing dam at the head of the Calloway ditch, " made under your instructions or Mr. Haggin's ?

" A. I don't know whether I instructed them " just what to do, but I instructed them to put " some water in the Calloway Canal. I don't " know that I told them how much to put in. I

" didn't tell them how far to extend that wing-
" dam."

Record, Vol. 2, fols. 2165–2166.

At the time the two patents of January and February, 1876, under which plaintiffs' claims were granted (which patents embraced some 33,-600 acres of this swamp land district), the Calloway party had built one mile of their canal.

Vining Barker, a witness for defendant, testifies :

" Q. Do you know anything about the Callo-
" way canal ?

" A. Yes, sir ; I had charge of it in January,
" 1876. That was the time I began * * * I
" remained there, I think, until about the 1st of De-
" cember, 1876. When I went there I think the
" canal was pretty nearly a mile completed, and
" some work beyond that, probably a mile and a
" half."

Record, Vol. 4, fols. 614, 615.

Cross-examination :

" Q. I understand that when you went there
" the canal was completed about one mile.

" A. No ; it was not completed entirely for a
" mile. There was no water in it when I first
" went there. * * * When I left, at the end
" of 1876, I think there was over two miles com-
" pleted ; I won't be certain."

Record, Vol. 4, fol. 618.

Whatever the defendant or his grantors did as to the construction of the Calloway canal, or as to any settlements along said canal, after February, 1876, was done with full notice of the fact that the plaintiffs had patents for some 33,000 acres of land on Buena Vista slough. But, in fact, the defendant, and the individuals interested with the defendant, had notice long before that that the plaintiffs had claims to land along Buena Vista slough in this swamp land district; for the plaintiffs had been pasturing cattle on this swamp land district for many years, and had a deed on record for some 12,000 acres of this swamp land years preceding the putting up of the Calloway notice of appropriation. Besides, the plaintiffs' patents of January and February, 1876, which cover 33,000 acres of the upper part of these swamp lands, show that plaintiffs must have had an equitable interest in these lands at least ten months previous to the actual date of said patents; that is to say, the plaintiffs must have purchased and paid the State twenty per cent. of the purchase price at least ten months before those patents were issued.

Political Code, §§ 3443, 3512, 3514.

"No patent must issue until after the expiration
" of one year from the date of the approval of the
" survey, or location by the Surveyor-General."

Political Code, Sec. 3521.

If the Court had allowed in evidence, upon the offer made by plaintiffs, in rebuttal, the thirty certificates of purchase issued to plaintiffs' grantors, for the lands described in the amended complaint, there would have been clear evidence that plaintiffs and their grantors had purchased said lands from the State, and had an equitable interest therein, years before the setting up of the Calloway notice of appropriation of May 4, 1875.

The plaintiffs in their amended complaint alleged generally that they were at the commencement of the action, owners in fee and in possession of the lands described in said amended complaint, and that they and their grantors had been such owners for more than one year before the commencement of this suit, and that such lands were swamp and overflowed, and as such belonged to the State of California until 1876, and later, when they were granted to plaintiffs, or their grantors.

Record, Vol. 1, fols. 87–88.

Defendant, in its answer, denied the ownership and possession of plaintiffs; denied that the land was granted by the State to the plaintiffs, or their grantors, in 1876, or at any time.

Plaintiffs, in their case in chief, put in evidence patents of the State of California for all of the land described in the amended complaint, except some 7240 acres, and for that they put in evidence

a decree in the case of *People* vs. *Center*, dated September 17, 1878, awarding the said land to them. They also put in evidence a deed from and executed by Thomas Baker, Julius Chester, H. P. Livermore and John H. Redington, of some 14,000 acres of land in the complaint described, dated May 28th, 1870, to prove that they were in possession of the land under that deed, and using the land from 1870 down to the trial of this case for pasturage purposes, and some portions of it for cultivation.

For last mentioned deed, see Record, Vol. 2, pp. 19, 20, 21, 22, 23.

In support of one of the special defenses set up by the defendant in its answer, counsel for defendant attempted to establish that their rights to the water of Kern river were acquired by the Calloway appropriation, before plaintiffs had any interest in the lands in suit, and that plaintiffs took the land under their patents, subject to the right of appropriation claimed in the Calloway notice.

The plaintiffs, after defendant had attempted to establish the facts set up in this special defense and had closed its case, offered, in rebuttal, certified copies of the certificates of purchase issued by the Register of the State Land Office for the land in suit, upon which plaintiffs' patents were based, together with certified copies of the assignments of such certificates to the plaintiffs, where deeds to plaintiffs had not already been put in evidence from the persons to whom some of said certificates were issued.

What occurred upon the trial in reference to this matter is to be found, Record, Vol. 5, pp. 65 to 98, both inclusive :

" *Mr. Houghton*—We offer in evidence a cer-
" tified copy of a certificate of purchase from the
" State Land Office, dated the 30th of September,
" 1872; signed by Robert Gardner, Surveyor-Gen-
" eral of the State of California, for all of sections
" 5, 10, 11, 12, 13, 14, 24 and 25 ; also, portions
" of sections 4, 6, 8, 9, 15, 22, 23, 26 and 35, in
" township 25, south range 21 east, Mount Di-
" ablo meridian, in favor of Richard H. Stretch,
" with the assignment endorsed thereon. * *

" It is a certified copy from the State Land
" Office. This is a portion of the land in the
" complaint described, and in the patents which
" we have offered in evidence.

" *Mr. Haggin*—What is the object of this ?

" *Mr. McAllister* — To show the time our
" grantors first became interested in this land
" showing when our equity in this land com-
" menced. To show when our inchoate right or
" equity originated. We want to prove whatever
" title this certificate gave ; and it is rebuttal to
" the appropriation of the Calloway. They put
" forward that title and we answer it by these cer-
" tificates. We propose to show the issuance of
" these certificates to certain parties, and the as-
" signments from those parties to the plaintiffs,
" and then the issuance of the patents in pursu-
" ance of the certificates. We seek to show that
" we acquired an inchoate interest in these lands

" at the date of these certificates and the point of
" time we became interested in these lands.

" Defendants object on the ground that it is ir-
" relevant, immaterial, incompetent and not pro-
" per testimony in rebuttal.

" *The Court*—If it is simply offered as rebut-
" ting testimony, I shall have to sustain the ob-
" jection.

" The plaintiffs except."

Record, Vol. 5, p. 65.

These thirty certificates were offered in evidence in connection with the offer of the first certificate tendered in evidence, whereupon the Court said : " These offers are all made in connec-
" tion with the first one, and under the same
" proposition ?

" *Mr. McAllister*—Yes, sir ; I understand the
" ruling is the same, and the exception is the same
" all the way through.

" *The Court*—Yes, sir."

Record, Vol. 5, p. 98.

In connection with these certificates, the plaintiffs also offered to show that each and all of said thirty certificates had been duly assigned to them. The plaintiffs had already shown by a deed, dated 28th May, 1870, from Thomas Baker, Julius Chester, Horatio P. Livermore and John H. Redington, to the plaintiffs, Henry Miller and Charles Lux, that the grantees of seven thousand acres of said certificates of purchase had conveyed said seven thousand acres to the plaintiffs. For this deed,

see Record, Vol. 2, pages 20 to 23, both inclusive.

After the plaintiffs had made their first offer to introduce these certificates in evidence, (to be found Record, Vol. 5, page 65), that there might be no doubt that they intended to connect themselves with said certificates, the plaintiffs made a further offer, as follows :

"*Mr. Houghton*—We desire to now make an "offer in connection with the certificates of pur-"chase. I think it was made at the time I made "the offer, to make the offer in connection with "them, to connect that title, where we have not "done so, with the patents, or the grantees of those "patents.

"*Mr. McAllister*—We think we made the "proposition yesterday, we want to be certain.

"*Mr. Garber*—I didn't so understand it. If "they wish to offer any further proof, I wish them "to offer it by questions.

"*Mr. McAllister.*—We have offered the doc-"uments.

"*Mr. Houghton.*—The offer was made yes-"terday.

"*Mr. Flournoy.*—The documents were not "presented.

"*Mr. Houghton.*—The statement was made in "connection with those certificates. We proposed "to connect them with our patents.

"*Mr. Garber.*—In what way ?

"*Mr. Houghton.*—By proper assignments.

"*Mr. Garber.*—Oh ! I don't care anything "about that.

"*The Court.*—That was done yesterday.

" *Mr. Garber.*—That was done yesterday.

" *Mr. McAllister.*—That is all we desire to do.

" *Mr. Houghton.*—That is our case, if the " Court please."

Record, vol. 5, p. 127.

Respondents, in that portion of their brief called "*Argument and Authorities,*" pages 21 and 22, say :

" The offer was simply to prove the certificates " of purchase, and in some instances the assign- " ments thereof to the plaintiff. There was no " offer to prove that the United States had ever " so acted as to vest title in the State. * * * " Nor was there any offer to prove the payment " of any portion of the purchase money to the " State, or that the laws of the State in regard to " the purchase of swamp and overflowed lands " had been complied with by the plaintiffs or their " predecessors."

These are very singular statements in view of the law applicable to this matter. The certificates of purchase cannot be issued, until the parties receiving them have paid twenty per cent. of the purchase price of the land described therein, and these certificates, together with the patents based upon them, which patents were offered and read in evidence by the plaintiffs, fully make out that the title had been vested by proper proceedings in the State, that the land was swamp and overflowed land, (which was not denied in the answer) and that the applications of the grantees, in said certificates of purchase had been accepted by the

proper State authorities, and that said grantees had paid twenty per cent. of the purchase price, and had acquired a vested interest in the land covered by said certificates.

Besides, the Code of Civil Procedure, makes these certificates of purchase, prima facie evidence of title.

Code of Civil Procedure, Section 1925.

Plaintiffs offered in evidence thirty certificates of purchase, executed by Robert Gardner, as Surveyor-General of the State of California, covering the lands described in the patents put in evidence by plaintiffs in their direct testimony, and constituting plaintiffs' title to the lands described in the amended complaint. These thirty certificates are marked as exhibits 43 to 72, both inclusive, and are set forth in the Record, Vol. 5, pp. 65 to 98, both inclusive. Twenty of these certificates were dated on the 28th day of January, 1870; two of them on the 6th day of June, 1870; four of them on the 30th of September, 1872; three of them on the 2nd of March, 1874, and one of them on the 5th of February, 1877.

So that all these certificates, save one, long antedated the setting up of the Calloway notice of appropriation, and twenty of the thirty antedated the Calloway appropriation by more than five years.

Witherspoon vs. *Duncan*, 4th Wallace, 218, 219.

"In no just sense can lands be said to be pub-
"lic lands after they have been entered at the

" Land Office, *and a certificate of entry obtained.*
" If public lands before the entry, after it they are
" private property. If subject to sale, the Gov-
" ernment has no power to revoke the entry and
" withhold the patent. A second sale, if the first
" was authorized by law, confers no right on the
" buyer, and is a void act. According to the well
" known mode of proceeding at the Land Offices
" (established for the mutual convenience of the
" buyer and seller), if the party is entitled by law
" to enter the land, the Receiver gives him a *cer-*
" *tificate of entry*, reciting the facts, by means of
" which, in due time he receives a patent. The
" *contract of purchase* is complete when the cer-
" tificate of entry is executed and delivered, and
" *thereafter* the land ceases to be a part of the
" public domain. The Government agrees to
" make proper conveyance as soon as it can, and
" in the meantime holds the naked legal fee in
" trust for the purchaser, who has the equitable
" title. As the patent emanates directly from the
" President, it necessarily happens that years
" elapse before, in the regular course of business
" in the General Land Office, it can issue; and if
" the right to tax was in abeyance during this
" time, it would work a great hardship to the
" State; for the purchaser, as soon as he gets his
" certificate of entry, is protected in his proprie-
" tory interest, can take possession and make val-
" uable and lasting improvements, which it would
" be difficult to separate from the freehold for the
" purpose of taxation."

" *Leavenworth L. & G. R. R. Co.* vs. *United* " *States*, 2nd Otto, 745. We go further, and say " that whenever a tract of land shall have been " legally appropriated to any purpose, from that " moment the land thus appropriated becomes " severed from the mass of public lands, and that " no subsequent law, proclamation, or sale, would " be construed to embrace or operate upon it, al- " though no reservation were made of it."

In *Union M. & M. Co.* vs. *Dangberg*, 2 Sawyer Cir. Ct. Reports, 455, the Court say:

" A point made by the plaintiff is, that some of " the defendants who have entered and paid for " their land, and received a certificate of purchase, " but no patent as yet, have no title by virtue of " which they can claim and exercise riparian " rights. It is true that such defendants have not " the strict legal title; but it is settled that the " entry and payment and certificate thereof convey " the equitable title. Thereafter the land ceases " to be public, and the Government has no right " to sell it again, but holds the legal title in trust " for the purchaser. The land is no longer the " property of the United States, and may be taxed " by the State without violating the compact not " to tax United States property. *People* vs. " *Shearer*, 30 Cal., 648; *Carroll* vs. *Safford*, 3 " How., 441; *Witherspoon* vs. *Duncan*, 4 Wall., " 210; *Hughes* vs. *United States*, 4 Wall., 232. " They have also the actual possession as well as " the beneficial estate or interest in the land, and " as such possessors and equitable owners are en-

" titled to enjoy all the incidents to the land and
" its ownership, as well as the land itself. The
" patent, when issued, relates back to the original
" entry, the inception of title, so far as is necessary
" to protect the purchaser's right to the land. *Id.*,
" and *Gibson* vs. *Chateau*, 13 Wall., 92. Upon
" these authorities it is evident that the plaintiff's
" objection is groundless. The defendants are, to
" all intents and purposes, *the owners of the land,*
" *and entitled to riparian rights.*"

In *People* vs. *Shearer*, 30 Cal. 647–648, the Court say:

" If any of the occupants and claimants have
" paid to the proper officer of the United States
" the purchase money for the lands, which they
" have been adjudged to be entitled to purchase
" in pursuance of the said Act of June 17th,
" 1864, the lands so paid for are clearly subject to
" taxation as lands, although the patent may not
" have been issued. By the payment and ac-
" ceptance of the purchase money, the claimant
" has performed everything to be done by him,
" and the purchase has been completed. The pay-
" ment, receipt of the purchase money, and the
" issuing of a receipt and certificate of entry
" therefor, constitute an entry of the land. The
" contract of purchase is executed, and the land is
" his, and no longer belongs to the Government.
" The conveyance has not been made, but the
" Government of the United States only holds the
" legal title in trust for the purchaser. The land
" no longer constitutes a part of the public domain,

" the United States have ceased to have any pro-
" prietary interest in it. It is henceforth private
" property, and as such, subject to taxation."

These thirty certificates of purchase were material evidence for plaintiffs, and were, under the ciscumstances, clearly admissible in rebuttal.

The plaintiffs made their case by proving title to the lands described in the amended complaint, and possession at the time suit was commenced, and that the Kern river ran through said lands. The defendant, under a special and affirmative defense (third answer) attempted to show that their rights to the waters of Kern river, by virtue of the Calloway appropriation of May 4th, 1875, antedated plaintiffs' rights.

While it is true that the legal title to these lands remained in the State until patents were issued, yet the State held the land in trust for the plaintiffs from the time of the issuance of the certificates of purchase; and plaintiffs should have been permitted to put in evidence the certificates to prove such fact, and to establish that defendant's right to the waters of Kern river under the Calloway appropriation originated long subsequent to plaintiffs' vested equity, in the lands in question, under their purchase from the State, evidenced by said certificates.

The plaintiffs in making out their case in chief, offered in evidence their patents, and gave proof of prior possession of the lands described in the complaint. They based their rights upon the proposition, that they were riparian proprietors,

along Buena Vista slough, and they had no reason to anticipate that the Court would allow, as against the riparian proprietors, evidence of appropriation of the waters of Kern River by the defendants or their grantors. This was especially so, in view of the provisions of the Civil Code as to Water Rights, under which Code plaintiffs made their appropriation, which provides. " The " rights of riparian proprietors are not affected by " the provisions of this table."

Civil Code, Section 1422.

After plaintiffs had rested, the defendants sought to establish by their Calloway notice of appropriation of May 4th, 1875, that they had a prior and preferable right to the waters of Kern river, by virtue of the appropriation mentioned in said Calloway notice, against the objection of the plaintiffs. This Calloway notice, and the proceedings of defendants and their grantors under it, was allowed in evidence by the Court. After that had been done, and the defendants had rested their case, it became, as we submit, entirely proper for the plaintiffs to rebut this Calloway appropriation (as to which no evidence had been adduced in the case of the plaintiffs) by showing that their legal title, as set forth in their patents, was initiated long anterior to the Calloway notice of appropriation. It was only after this evidence of the defendants had been allowed by the Court, to-wit: The Calloway notice of appropriation, that it became at all essential for the plaintiffs to show their certificates of purchase. Pending the introduc-

tion of this evidence by defendants, plaintiffs applied to the Surveyor-General of California for certified copies of these certificates of purchase, which certificates they had under the law surrendered at the time they received their patents for the lands described therein.

Plaintiffs received these certificates after their case had closed, as will be shown by the dates of the certificate of the Surveyor-General affixed thereto. This date is May 7th, 1881, some five days after the Calloway notice of appropriation had been admitted in evidence by the Court. The whole idea suggested in the brief of respondents, that plaintiffs purposely held back these certificates until the last moment of the trial, finds no support in the evidence of the case, and exists only in the imagination of respondent's counsel.

In this connection, we would further observe, that the only objection made by the defendants to these certificates of purchase was, that they were not rebutting evidence. No point was made that they were not admissible under the pleadings; but the single and solitary objection was interposed, that they did not constitute rebutting evidence. Had the point been made, that they were not admissible under the pleadings, plaintiffs would then have had an opportunity of amending their pleadings, or taking such other course as they might deem advisable. The objection, therefore, as it appears before this Court, must be limited, as it was in the Court below, to the single objection, that the certificates were not

proper rebutting evidence, in the then condition of the case.

Abbey Homestead Assn. vs. *Willard*, 48 Cal., 615, 616, 618.

" The plaintiff was a corporation, and on the " trial introduced in evidence a lease of the de- " manded premises made by it to the defendant, and " signed by the defendant, dated May 2, 1870, for " the term of six months, reserving a rental of one " dollar a month, and proved the value of the use " of the premises from October 3, 1870, to the " 11th day of January, 1871, and rested. The " defendant moved for a non-suit, because the " plaintiff had failed to prove that he was in the " posssession of the premises when the suit was " brought. The Court denied the motion, and " then suggested that the plaintiff might prove " that the defendant was in possession. The plain- " tiff thereupon recalled the witness before sworn, " and examined him as to the defendant's posses- " sion, to which the defendant objected. The " plaintiff again rested. The defendant was then " sworn on his own behalf, and testified that when " the lease was executed he had been in posses- " sion of the demanded premises fifteen years, " claiming the same in his own right, adversely to " the plaintiff and its predecessors and grantors, " and that he was still in possession. * * * " (page 615).

" The plaintiff, *in rebuttal*, thereupon was per- " mitted by the Court, against the objections of " the defendant, to introduce in evidence a patent

" issued by the United States for the demanded
" premises to Henry R. Payson, dated December
" 15, 1865; a deed from said Payson to Albert
" Wheeler, dated March 3, 1853; a deed from
" Wheeler and his wife to Jules B. Bayerque,
" dated November 17, 1857; a contract between
" said Wheeler and wife and Pioche and the Vis-
" itacion Land Company, dated in May, 1867,
" agreeing to sell the land to said company; a
" deed from said Pioche and others to the Visita-
" cion Land Company, dated May 15, 1870; and
" a written contract of said company to sell the
" land to Richard Blaikie, dated March 11, 1869,
" and an assignment of that contract to the plain-
" tiff on the 17th of March, 1869. Plaintiff also
" introduced in evidence the will and probate pro-
" ceedings in the matter of the estate of Jules B.
" Bayerque, and a deed by the executors of the
" will, conveying the land to said Pioche.

" The plaintiff recovered judgment, and the de-
" fendant appealed from the judgment and from
" an order denying him a new trial. * * *
(p. 616).

" It is also urged that the Court erred in per-
" mitting the plaintiff to offer evidence of the de-
" raignment of his title, after the defendant had
" closed. The plaintiff defends the action of the
" Court, on the ground that the defendant, having
" relieved himself of the estoppel of the lease, by
" proving that he was in possession of the prem-
" ises at the time of the execution of the lease,
" the burden of the proof of title was cast on the
" plaintiff.

" But this is not the rule. (See *Peralta* vs. " *Ginochio*, 47 Cal., 459.) The plaintiff was en- " titled to rely upon the lease as *prima facie* evi- " dence of title, and this was not overcome by the " mere fact that the defendant was in possession " at its execution. The burden of proof was on " the defendant to show paramount title in him- " self, or one under whom he claimed. But, in " our opinion, the evidence *was properly admitted* " *in rebuttal*—to overthrow the defense of adverse " possession " (p. 618).

Kent vs. *The Town of Lincoln*, 32 Vermont, 598 :

" The plaintiff is entitled to rest upon making " a *prima facie* case. The defendant is then to " introduce all his evidence in answer to the plain- " tiff's claim. The plaintiff is then allowed to " introduce testimony to rebut the evidence given " by the defendant, and also additional evidence " in support of his case as made in the opening, " and ordinarily this closes the evidence."

Briggs vs. *Ainsworth*, 2 Moody and Rob., 168.

This was a case for negligent driving of defendant's carriage against the carriage of plaintiff. Plaintiff gave in evidence that his carriage was run against, at Layton, in Essex, by a carriage, driven by defendant; and also called witnesses to show that defendant was in the neighborhood, when the collision occurred. Defendant called witnesses to prove that he was not in Layton at

the time, but in Richmond, and during the progress of the plaintiff's case, the plaintiff's witnesses were cross-examined as to their being certain of the identity of defendant, with the driver of the carriage. Defendant having closed his case, plaintiff proposed to call other witnesses, to disprove the defense, by showing that defendant was not at Richmond, but at Layton at the time in question. This was objected to as not competent; that plaintiff's attention had by the form of cross-examination of his witnesses, been directed to the importance of proving that the defendant was at Layton, and that she should have exhausted that line of evidence. Lord Denman, C. J., held the evidence admissible.

Scott vs. *Woodward*, 2 McCord, 162.

" If a person have several distinct titles to a tract " of land, he may avail himself of them all to enable " him to hold against any opposing claim. And al- " though there can be but one good title to the same " land, yet, as it may be doubtful which, among " several, is the best, if he should happen to be de- " feated in one he may resort to another. Thus, if " a person should claim by devise, and it should be " shown by the opposite party that the will was ob- " tained by fraud, or not properly executed, he " might nevertheless show that he was entitled to " hold by descent. But the objection is not in this " case, that the testimony was incompetent, but " that it could not be admitted in reply. *Any- " thing may be given in evidence in reply, which is " a direct answer to that produced on the part of the*

" *defendant.* If a defendant give in evidence a
" release, the plaintiff may reply forgery. If he
" offer a discount, the plaintiff may show that it
" has been paid, or as in this case, that it has been
" barred by the Statute of Limitations. In the
" case under consideration, the defendant produced
" an elder grant; the plaintiff offered to do away
" the effect of it, by proving an adverse possession.
" Until the defendant's grant was produced, the
" plaintiff had shown a good title in himself. And
" when a plaintiff has established his case, he need
" offer no further evidence until some proof is
" offered on the other side to destroy or impair it.
" The plaintiff could not know that the defendant
" would rely on an elder grant, or that he
" even had one, until it was produced. And even
" if he had known it, would not have been re-
" quired and perhaps not allowed to impede the
" business of the Court by giving evidence in an-
" ticipation of testimony which might not exist or
" not be produced. And although such a method
" of proceeding must necessarily allow the de-
" fendant the right of rejoining in evidence, yet
" that furnishes no objection. Such a course must
" frequently be pursued when a defendant is per-
" mitted to give in evidence, any special matter
" which leads to a distinct issue, in which he stands
" in the situation of a plaintiff."

Wade vs. *Thayer*, 40 Cal., 578, syllabus.

" Where a plaintiff, in rebuttal, introduces evi-
" dence in contradiction of the witnesses of the
" defendants, it is competent to the latter, after

" the plaintiff has rested, to support their credi-
" bility by the introduction of additional testi-
" mony."

Gilpins vs. *Consequa*, 3 Washington's Circuit Court R., 188, 189.

" The counsel moved that he might examine
" the super-cargo, to explain a transaction which
" had come out on the defendant's testimony, re-
" specting ginseng, which had been smuggled
" on shore from the Pennsylvania Packet; and
" also, to repel an argument which the defendant's
" testimony would authorize being urged, that it
" was the duty of the plaintiffs' super-cargo to
" have examined, for himself, all the teas; and
" that it was to be presumed, either that he had
" done so and was satisfied, or that having neg-
" lected to do so, the defendant was not liable.
" That he meant to prove, that the defendant told
" the super-cargo he need not examine the teas,
" as he, the defendant, was bound, by his con-
" tract, to deliver him good teas.

" *By the Court.*—As to the affair of the ginseng,
" the plaintiffs have certainly a right to examine
" witnesses to explain it. *They may also repel*
" *any argument to be drawn from the evidence*
" *given by the defendant*, that the plaintiffs' super-
" cargoes either examined the teas and were sat-
" isfied with them, or that they might have done
" so, and were therefore guilty of a faulty negli-
" gence in not doing so. The evidence offered to
" be given is, in this point of view, proper."

Colton Land and Water Company vs. *Raynor*, 57 Cal., 589.

" No replication is required by our law of pro-
" cedure. * * * But what the defendant
" could not do by an actual pleading the law does
" for him under the last clause of § 462 of the
" Code of Civil Procedure, 'the statement of *any*
" *new matter* in the answer, in *avoidance*, or con-
" stituting a *defense*, or counter-claim, must, on
" the trial, be deemed controverted by the oppo-
" site party.' This has always been regarded as
" allowing a plaintiff, in reply to such new matter,
" to introduce on the trial any evidence which
" countervails or overcomes it, as if it were in-
" serted in a replication, and pleaded with all the
" precision and fullness which the strictest rules
" of law ever required."

Hayward vs. *Draper*, 3 Allen, 552, 553.

" The injury done to the plaintiff by the deceit
" which he charged the defendants with conspiring
" to practice upon him, was, by inducing him to
" purchase an interest in a patented machine, al-
" leged to be of little value. The plaintiff in-
" troduced evidence of the worthlessness of the
" machine, and after he had closed his case, the
" defendants exhibited what they said was a
" model of the machine, for the purpose of show-
" ing its principle and operation. The plaintiff
" denied that the model was a true representation
" of the machine sold to him, and upon this the
" evidence was conflicting. The defendants' wit-
" nesses testified that the machine would work

" well and continuously, illustrating their testi-
" mony by the model. The plaintiff then called
" an expert of large experience, and asked him to
" examine the model, which he did. The plaintiff
" then proposed the question to him, 'whether or
" not a machine made according to that model
" could be successfully used after a few trials?'
" This was excluded by the Court, as not being
" rebutting testimony, because the plaintiff had
" put in testimony in chief as to the working of
" the machine.

" We are of opinion that this was too close a
" restriction of the plaintiff's right. He did not,
" indeed, admit the accuracy of the model, and if
" the jury did not find it to be a correct represen-
" tation, they should disregard it. But it was be-
" fore the jury, submitted for their consideration,
" and was a species of evidence likely to make an
" impression upon their minds. The plaintiff had
" no opportunity to meet this particular piece of
" evidence until the defendants produced it. He
" denied its accuracy—contended that it was too
" favorable a representation of the actual machine;
" but he wished to show by competent evidence
" that even this was not fitted for work. He
" wished the jury to understand the difference be-
" tween a model and a working machine; that
" one might work, and be made to work before
" their eyes, when the other would not. And we
" are all of opinion that he should have been per-
" mitted to do so. It was not new evidence to
" support the issue in chief, because he denied the
" correctness of the model; but it was evidence

" offered and competent for the single purpose of
" impairing the effect of a piece of testimony in-
" troduced by the defendants."

Doe vs. *Gosley*, 2 Moody & Robinson, 243.

Syllabus: " Where a plaintiff in ejectment
" makes out a *prima facie* case as heir at law, and
" is answered by a will being set up for the defen-
" dant, he is at liberty, in reply, to put in a sub-
" sequent will, whereby the estates claimed were
" devised to him."

The common law doctrine of riparian rights.

The leading case upon this subject in England is *Mason* vs. *Hill*, 5 Barnewell and Adolphus 1. In that case, Chief Justice Denman, among other things, said :

" The proposition for which the plaintiff con-
" tends is, that the possessor of land, through
" which a natural stream runs, has a right to the
" advantage of that stream, flowing in its natural
" course, and to use it when he pleases, for any pur-
" poses of his own, not inconsistent with a similar
" right in the proprietors of the land above and
" below—that neither can any proprietor above di-
" minish the quantity, or injure the quality of
" water which would otherwise descend, nor can
" any proprietor below throw back the water with-
" out his license or grant; and that, whether the
" loss by diversion, of the general benefit of such
" a stream be or be not, such an injury in point of
" law, as to sustain an action without some special

" damage, yet, as soon as the proprietor of the
" land has applied it to some purpose of utility, or
" is prevented from so doing by the diversion, he
" has a right of action against the person divert-
" ing.

" The proposition of the defendants is, that the
" right to flowing water is *publici juris*, and that
" the first person who can get possession of the
" stream and apply it to a useful purpose has a
" good title to it against all the world, *including*
" the proprietor of the land below, who has no
" right of action against him, unless such propri-
" etor has already applied the stream to some use-
" ful purpose also, with which the diversion inter-
" feres; and in default of his having done so,
" may altogether deprive him of the benefit of the
" water.

" In deciding this question we might content
" ourselves by referring to, and relying on, the
" judgment of this Court in this case on the mo-
" tion for a new trial, 3 B. & Ad., 304; but as
" the point is of importance, and the form in which
" is now again presented to us, leads to a belief
" that it will be carried to a court of error, we
" think it right to give the reasons for our judg-
" ment more at large.

" The position, that the first occupant of run-
" ning water for a beneficial purpose has a good
" title to it is perfectly true in this sense, that nei-
" ther the owner of the land below can pen back
" the water, nor the owner of the land above di-
" vert it to his prejudice. In this, as in other cases
" of injuries to real property, possession is a good

" title against a wrong-doer; and the owner of
" the land who applies the stream that runs
" through it, to the use of a mill newly erected, or
" other purposes, if the stream is diverted or ob-
" structed, may recover for the consequential in-
" jury to the mill. The *Earl of Rutland* vs. *Bow-*
" *ler*, Palmer, 290. But it is a very different ques-
" tion whether he can take away from the owner
" of the land below one of its natural advantages,
" which is capable of being applied to profitable
" purposes and generally increases the fertility
" of the soil, even when unapplied; and deprive
" him of it altogether by anticipating him in its
" application to a useful purpose, If this be so,
" a considerable part of the value of an estate,
" which, in manufacturing districts particularly, is
" much enhanced by the existence of an unappro-
" priated stream of water with a fall, within its
" limits, might at any time be taken away; and,
" by parity of reasoning, a valuable mineral or
" brine spring might be abstracted from the pro-
" prietor in whose land it arises, and converted to
" the profit of another.

" We think that this proposition has originated
" in a mistaken view of the principles laid down
" in the decided cases of *Bealey* vs. *Shaw*, 6 East,
" 208; *Saunders* vs. *Newman*, 1 B. & A., 258;
" *Williams* vs. *Moreland*, 2 B. & C., 913. It ap-
" pears to us also that the doctrine of Blackstone
" and the dicta of learned judges, both in some of
" those cases and in that of *Cox* vs. *Mathews*, 1
" Ventr., 137, have been misconceived. Pages
" 19, 20. * * * *

" None of these dicta, when properly under-
" stood with reference to the cases in which they
" were cited, and the original authorities in the
" Roman law from which the position that water
" is *pnblici juris* is deduced ought to be consid-
" ered as authorities, that the first occupier, or
" first person who chooses to appropriate a natu-
" ral stream to a useful purpose has a title against
" the owner of land below, and may deprive him
" of the benefit of the natural flow of water."
Pages 21, 22. * * * *

" From these authorities it seems that the Ro-
" man law considered running water not as a
" *bonum vacans*, in which any one might acquire a
" property, but as public or common *in this sense*
" *only*, that all might drink it or apply it to the
" necessary purposes of supporting life, and that
" no one had any property in the water itself, ex-
" cept in that particular portion which he might
" have abstracted from the stream, and of which
" he had the possession, and during the time of
" such possession only.

" We think that no other interpretation ought
" to be put upon the passage in Blackstone, and
" that the dicta of the learned judges above re-
" ferred to, in which water is said to be *publici*
" *juris*, are not to be understood in any other
" than this sense; and it appears to us that there
" is no authority in our law, nor, as far as we
" know, in the Roman law (which, however, is no
" authority in ours), that the first occupant (though
" he may be the proprietor of the land above) has
" any right, by diverting the stream, to deprive

" the owner of the land below of the special bene-
" fit and advantage of the natural flow of water
" therein." Page 22. * * * *

" We are, therefore, clearly of opinion that the
" plaintiff is entitled to recover in respect of the
" abstracting of the water taken from the Over
" Canal Springs, as well as the other injuries com-
" plained of, and for which damages have been as-
" sessed by the jury." Page 23.

Counsel for defendant claims that this doctrine of riparian rights was no part of the common law; that it was not a part of that common law which our ancestors brought with them from England; and they refer to a case decided in 25 of Charles II., about the year 1675.

Cox vs. *Mathews*, 1 Ventris, 237.

They also refer to Blackstone's Commentaries, Book, 2 pages 14, 403.

Bealey vs. *Shaw*, 6 East., 208.
Saunders vs. *Newman*, 1 Barnewell & Ald., 258.
Tiggins vs. *Inge*, 7 Bingham, 692.

Now, these are the very authorities which Lord Denman, in *Mason* vs. *Hill*, says have been misconceived.

See *Mason* vs. *Hill*, 5 Barnewell & Adolph, 19, 20, 21.

No doubt the case of *Mason* vs. *Hill*, expresses the doctrine of riparian rights more distinctly and

emphatically than it had been stated in earlier cases. But this doctrine was not the growth of any English statute. The argument of defendant would have a great deal of force, if they could show that since the exodus of the American colonists from England, that since their advent in America, there had been passed some English statute which, for the first time, in modification and repeal of the common law, had adopted the doctrine of riparian rights. But there is no such case presented. The same subject matter of property in water, the same right, the same conditions existed in the time of Charles the Second, when the case of *Cox* vs. *Mathews* was decided, as existed in *Mason* vs, *Hill*, in 1833, when Lord Denman rendered his judgment.

This last decision was nothing more than the application of a more precise and better understanding of the true grounds upon which property in water was held; a better understanding of the tenure by which water was owned. It was to all intents and purposes announced by Lord Denman as a common law doctrine. It was the application of reason to a subject matter entirely untouched by statutes. But some years before this decision of Lord Denman's in *Mason* vs. *Hill*, Judge Story had, in 1827, fully recognized the doctrine of riparian rights as prevailing in America and as part of the American common law. He did not borrow the doctrine from Lord Denman, for the case in 4 Mason was decided in 1827, and the decision of Lord Denman was in 1833.

Taylor vs. *Wilkinson*, 4 Mason, 400.

Judge Story in this case says, 4th Mason, 400:

" Before proceeding to an examination of these " points, it may be proper to ascertain the nature " and extent of the right which riparian proprie- " tors generally possess, to the waters of rivers " flowing through their lands. * * *

" *Prima facie* every proprietor upon each bank " of a river is entitled to the land, covered with " water in front of his bank, to the middle thread " of the stream, or as it is commonly expressed " *usque filum aquæ.* In virtue of this ownership " he has a right to the use of the water flowing " over it in its natural current *without diminution* " *or obstruction.* But, strictly speaking, he has no " property in the water itself, but a simple use of " it while it passes along. The consequence of " this principle is, that no proprietor has a right " to use the water to the prejudice of another. It " is wholly immaterial whether the party be a " proprietor above or below in the course of the " river, the right being common to all the proprie- " tors on the river, no one has a right to diminish " the quantity which will, according to the natural " current, flow to a proprietor below, or to throw " it back upon a proprietor above. This is the " necessary result of the perfect equality of right " among all the proprietors of that which is com- " mon to all. The natural stream, existing by the " bounty of providence for the benefit of the land " through which it flows, is an incident annexed by " operation of law, to the land itself." pp. 400, 401.

He goes on then to speak of appropriation: "Mere priority of appropriation of running water, "without such consent or grant, confers no exclu- "sive right. It is not like the case of mere occu- "pancy, where the first occupant takes by force "of his priority of occupancy. That supposes "no ownership already existing, and no right to "the use already acquired. But our law annexes "to the riparian proprietors the right to the use "in common, *as an incident to the land;* and who- "ever seeks to found an exclusive use must es- "tablish a rightful appropriation in some manner "known and admitted by the law. Now, this may "be either by a grant from all the proprietors, "whose interest is affected by the particular appro- "priation, or by a long exclusive enjoyment, with- "out interruption, which affords a just presump- "tion of right. By our law upon principles of "public convenience, the term of twenty years of "exclusive uninterrupted enjoyment has been "held a conclusive presumption of a grant or "right." (Pp. 401, 402.) * * * *

"These are the general principles which appear "to me applicable to the present case. They will "be found recognized in many cases; but are in "none more fully and accurately weighed and "discussed than in *Bealey* vs. *Shaw*, 6 East, 208; "*Williams* vs. *Moreland*, 2 Barn. & Cresw., "910; and *Wright* vs. *Howard*, 1 Simon & Stuart, "190, in England; and in *Ingraham* vs. *Hutchin-* "*son*, 2 Connect. R., 584; *Merritt* vs. *Parker*; 1 "Coxe, 460; *Palmer* vs. *Mulligan*, 3 Caines R.,

" 307; *Platt* vs. *Johnston*, 15 Johns. R., 164;
" and *Merritt* vs. *Brinkerhoof*, 17 Johns. R., 120,
" in America." p. 402.

Washburn, in his work on Easements, speaking of this case of *Tyler* vs. *Wilkinson*, says :

Washburn on Easements, p. 216.

" The following extended quotation from the
" opinion of Story, J., in the case of *Tyler* vs.
" *Wilkinson*, presents views of the law upon this
" subject which have met the approbation of
" American courts and been liberally cited and
" commended by the English courts, especially by
" the very able judges of the present Court of
" Exchequer."

Goddard on the Law of Easements, pp. 251–252.

" That all riparian owners of natural streams
" have a riparian right to use the water as it flows
" past their land, so long as they do not interfere
" with the natural rights of other riparian owners,
" and to sue for disturbance is now an established
" doctrine of law; but this doctrine was not es-
" tablished until comparatively modern times, and
" in the earlier decisions of the courts a theory of
" a very different kind was advanced, by which
" rights were supposed to be acquired by the ap-
" propriation of water, similar to those rights
" which have since been held to belong to all ri-
" parian proprietors of streams *ex jure naturæ*.
" The earliest doctrine on this subject appears to

" have been that flowing water was the property
" of no one, and that nobody had any particular
" right to use it until somebody actually took pos-
" session and applied it to a purpose of utility;
" that by so doing he acquired a right to continue
" the use of it against all the world, and that his
" right continued until he chose to abandon his
" user. This theory of title by appropriation was
" much modified by various decisions, as the na-
" ture of riparian rights was brought more fully
" under consideration; and ultimately it was de-
" termined that these riparian rights to the use
" and uninterrupted flow of streams *were not ac-*
" *quired by appropriation at all*, but that they ex-
" isted and belonged to every riparian owner of
" land, *ex jure naturæ whether he chose to make*
" *use of them or not.*

" When, however, this change of opinion first
" arose, it was also held that the effect of appro-
" priation was to give the riparian owner a right
" to sue for disturbance, for it was conceived that
" he could not sustain any damage by loss of water,
" until he had applied it to a purpose of utility, and
" that purpose was disturbed, for actual damage
" was always considered essential to support an
" action on the case. In process of time, however,
" this theory was also abandoned, and it appears
" now to be considered *that an action will lie for*
" *every disturbance of riparian rights without evi-*
" *dence of appropriation of the water for any pur-*
" *pose of utility and without even proof of any*
" *special damage, but simply on the ground that a*
" *legal right is injured by the disturbance, and that*

" *this is sufficient damage to support the action.*
" *Appropriation of the water of flowing streams for*
" *purposes of utility has thus gradually fallen from*
" *being considered a means of acquiring important*
" *water rights, to being deemed of no importance*
" *whatever, whether as a mode of gaining a right,*
" *or of acquiring a right, to sue for disturbance.*"

Bainbridge on Mines, 102, 103, asserts the same doctrine; and the ground of all these decisions is, a ground which seems to have escaped the observation of the earlier judges, that there is such a thing as property in flowing water, and it is just as much an incident and part of the corpus of the property as the land itself.

Mr. Bainbridge says:

"It is true the water may elude any grasp by
" the hand of man, but the air is also intangible in
" any changeless state, yet the law extends the
" right of soil, *usque ad cælum*, and it also gives
" him a qualified right of property in the wild
" birds and other game during the period of their
" sojourn on his land. * * * It was
" formerly thought that a prior appropriation of
" natural water gave a right over those owners
" who afterwards sought to turn it to some special
" use, and, in fact, that a right to water was ac-
" quired by occupancy; but it is now clearly set-
" tled, that any appropriation which injures any
" other owner must be established as an easement
" and until so established may be resisted." * *

"The *dicta* of various judges with respect to
" flowing water being *publici juris*, founded chiefly
" on the civil law, cannot be wholly supported. * *
" It has also been thought that an injurious appro-
" priation could not be resisted by any other pro-
" prietor unless he could show that he had sustained
" some special damage, as there would otherwise
" be but *injuria sine damno*, and, therefore, no
" cause of action on the case for a tortious act.
" This damage, it was said, could be shown by his
" having already applied the stream to some use-
" ful purpose interfered with by the act of dis-
" turbance, or by some subsequent application of
" it at any time before the first appropriation be-
" came established by law. *But as the whole doc-*
" *trine of appropriation may now be held to be*
" *abandoned, and as the riparian proprietor must*
" *be considered to hold his right to the use of water*
" *as an incident to his estate, it ought also to follow*
" *that no positive act on his part is required for*
" *preserving his right, except by way of preventing*
" *any other proprietor from acquiring a disturbing*
" *right by time.*"

Wood vs. *Waud*, 3 Welsby, Hurlstone and Gordon, 772. "The fact as found by the jury is,
" that the defendants (whose works have been
" erected within twenty years, and who have no
" right, by long enjoyment or grant, so to do)
" have fouled the water of the natural stream, by
" pouring in soap suds, woolcombers' suds, etc.;
" but that pollution of the natural stream *has done*
" *no actual damage to the plaintiffs*, because it was

" already so polluted by similar acts of mill
" owners above the defendants' mills, and by
" dyers still further up the stream, and some
" sewers of the town of Bradford; that the
" wrongful act of the defendants made no practi-
" cal difference, that is, that the pollution by the
" defendants did not make it less applicable to
" useful purposes than such water was before. We
" think, notwithstanding, that the plaintiffs have
" received damage in point of law. They had a
" right to the natural stream flowing through the
" land, in its natural state, as an incident to the
" right to the land on which the watercourse
" flowed, as will be hereafter more fully stated;
" and that right continues, except so far as it may
" have been derogated from by user or by grant
" to the neighboring landowners.

" This is a case, therefore, of *an injury to a*
" *right.* The defendants, by continuing the
" practice for twenty years, might establish the
" right to the easement of discharging into the
" stream the foul water from their works. If the
" dye works and other manufactories, and other
" sources of pollution above the plaintiffs, should
" be afterwards discontinued, the plaintiffs, who
" would otherwise have had, in that case, pure
" water, would be compellable to submit to this
" nuisance, which then would do serious damage
" to them. We think, therefore, that the verdict
" must be entered for the plaintiffs on every part
" of not guilty to the first count."

Embrey vs. *Owen*, 6th Welsby, Hurlstone & Gordon, 368.

" The law as to flowing water is now put on " its right footing by a series of cases, begin- " ning with that of *Wright* vs. *Howard*, 1 Sim. " & S., 190, followed by *Mason* vs. *Hill*, 3 B. & " Ad., 304; 5 Id., 1, and ending with that of " *Wood* vs. *Waud*, 3 Exch., 748, and is fully set- " tled in the American Courts. See 3 Kent's " Comm., Lect. 52, pp. 439, 445.

" The right to have the stream to flow in its " natural state, *without diminution or alteration*, " is an incident to the property in the land through " which it passes; but flowing water is *publici* " *juris*, not in the sense that it is a *bonum vacans*, " to which the first occupant may acquire an ex- " clusive right, but that it is public and common " in this sense only, that all may reasonably use " it who have a right of access to it; that none " can have any property in the water itself, except " in the particular portion which he may choose " to abstract from the stream and take into his " possession, and that during the time of his pos- " session only. (Sec. 5, B. & Ad., 24.) But each " proprietor of the adjacent land has the right " to the usufruct of the stream which flows " through it."

Phear on Rights of Water, p. 26.

" It was decided in a comparatively early case, " where the defendant had an acknowledged ac- " quired right to divert a large portion of water

" from a stream, that he could not divert an in-
" creased quantity to the prejudice of the plaintiff,
" who was an inferior proprietor. But here the
" plaintiff had, previously to the act complained
" of, beneficially appropriated the original surplus,
" and, therefore, the decision did not in itself re-
" quire for its support any broader ground than
" that afforded by the doctrine of priority in bene-
" ficial occupancy. Thus, notwithstanding the
" principles enunciated by Lord Ellenborough in
" giving his judgment in this case, and the dis-
" tinct legal grounds upon which Sir J. Leach re-
" fused to decree specific performance in *Wright*
" vs. *Howard*, there still remained, in the absence
" of an authoritative decision on the point some
" room for a struggle in favor of the first occupi-
" er. At last the Court of Queen's Bench settled
" this question, by deciding, among several other
" points submitted to them in the case of *Mason*
" vs. *Hill* already quoted, *that it was no defense to*
" *an action for diversion of water from a stream,*
" *that the defendant did so by virtue of being the*
" *first person who had appropriated the water to a*
" *beneficial purpose.*"

One of the most elaborate and carefully considered decision as to the doctrine of riparian rights is to be found in the case of *Van Sickle* vs. *Haines*, decided by Judges Lewis, Whitman, and Garber, in 1872.

Van Sickle vs. *Haines*, 7 Nevada, pp. 257, 259, 264, 269, 272, 273, 286, 290.

" By the Court, Lewis, C. J. :

" When this case was originally before us, we " gave it the most anxious and thorough consider- " ation, and were drawn to the conclusion at which " we arrived by an uniform current of decisions, " the correctness of which has never been ques- " tioned, by rules as well established as any in the " books, and the logic of principles which have " become maxims in the law. Still, although no " new point is suggested, we are asked to grant a " rehearing, upon the assurance in the outset that " it is asked only upon the strongest conviction " that our error is demonstrable. The argument " presented, however, falls far short of satisfying " the expectations thus awakened." p. 257.

* * * * " Although satisfied that our " former opinion is correct, beyond all question, " still the principles involved being of such gen- " eral interest and application, it is important that " they should not be misunderstood. We have, " therefore, given the matter further considera- " tion, but in the very thorough research which has " been made, we have found no legal principle or " decided case which would authorize a reversal " of our former conclusion, but rather at every " step we have met with confirmation of its cor- " rectness, and an insuperable barrier to the adop- " tion of any other rule." p. 259. * * *

" Being the absolute owner of the soil, the " source of all title thereto, and entitled to all the

" remedies for its protection and preservation
" which are given to any individual owner, it cer-
" tainly cannot be maintained that it is not equally
" entitled to everything which is naturally such an
" inseparable incident to the land, that it is fre-
" quently spoken of as a part of the soil itself.
" Such an incident is a natural watercourse. It
" passes by deed of the soil without any mention,
" and forms as marked a feature of the land
" through which it passes as the trees upon it, or
" the vegetation which it nourishes. Nothing
" more readily recommends itself to the under-
" standing than that an element which the laws of
" nature have connected with the freehold, and
" which, without any effort on the part of man,
" clothes it with refreshing verdure ; where, with-
" out it there must be only forbidding nakedness ;
" creating fertility and productiveness, where other-
" wise there would be only sterility ; at once ad-
" ministering pleasure and affording profit, is
" necessarily a part of, or an incident to his land.
" This is the natural effect of running water, *inde-*
" *pendent of any use which may be made of it* in
" administering to the immediate wants of man
" and beast."

" How frequent it is, that small streams of
" water are found to add immeasurably to the
" value of estates, even when no particular use is
" made, or intended to be made of them! It
" is very seldom, indeed, that they do not, to some
" extent, enhance the value of real property, and
" they are frequently esteemed invaluable." Page
264. * * *

"What is to be understood by the maxim so
" often quoted, and which lies at the foundation
" of water-rights *aqua currit et debet currere ut*
" *currere solebat?* This is substantially that no
" man has the right to divert a stream from
" its natural course; for to say that water
" should be permitted to run, as it used to,
" is a prohibition upon all to divert it from
" its course, and thus the very maxim shows
" the proprietors have the right to claim that the
" stream shall be permitted to run through their
" land in its natural channel, *independent of whether*
" *they make any particular use of it or not.*" Page
269. * * * * * * *

" These authorities completely overturn the ar-
" gument for the petitioner in this case; for if the
" right be one inseparably incident to the land;
" if the right to have the stream continue its flow
" in its natural channel does not grow out of, or
" depend upon any special user; or if, in the lan-
" guage of the cases, *the owner of land on a stream*
" *is necessarily and at all times using the water*
" *running through it without any act of his own,*
" *by the fertility which its natural flow imparts to*
" *the soil*, then it follows that the United States
" is as capable of enjoying the right as an indi-
" vidual, as its land will be no less benefited by
" the natural flow of the stream than that of the
" citizen, nor would the diversion of it be any less
" injurious to it than it would to an individual
" who is making no special appropriation of it.
" Indeed, the whole argument is based upon the
" assumption that the riparian proprietor has no

" right to have a stream continue its flow through
" his land unless he has some special use to make
" of it, or has made some particular appropria-
" tion of it; *whereas every case which has ever*
" *come under the observation of the Courts (and*
" *they are numerous)*, holds the contrary." Pages
" 272–273. * * * " But suppose this decision
" should necessitate the adoption of the com-
" mon law respecting the manner in which running
" water may be used by those having the right to
" it. Although it may operate unjustly in some
" cases, still as a general rule *none more just and*
" *reasonable can be adopted for this State.* It is a
" rule which gives the greatest right to the great-
" est number, authorizing each to make a reason-
" able use of it; providing he does no injury to
" the others equally entitled to it with himself,
" whilst the rule of prior appropriation here ad-
" vocated would authorize the first person who
" might choose to make use of, or divert a stream,
" to use or even waste the whole to the utter ruin
" of others who might wish it." Page 286.

* * * * * * *

By Garber, J., concurring:

" If I believed that a re-argument could throw
" any additional light on the questions involved,
" I should unhesitatingly advise the granting of
" the petition. Because I feel sensibly that the
" decision we have been compelled to render, in
" obedience to the law as it is written, and which
" it is our function to declare and not to alter,
" may work great hardship in this particular case;
" and, as a general rule, applicable to a certain

" class of patents; may disappoint expectations
" long, though erroneously, considered by the
" public as well founded. Unfortunately, this is
" not a case where such common error can be
" said to have made itself law; and, after as thor-
" ough an investigation as I am capable of mak-
" ing, I feel constrained to concur in the position
" so fully elaborated by the Chief Justice, that on
" every point essential to the case of the peti-
" tioner, *not merely the weight of authority, but all*
" *the authorities are against him.* Against a clear
" and explicit rule of law, no arguments from in-
" convenience, however forcibly urged, can pre-
" vail. As to the existence and extent of the
" right of a riparian proprietor to use the water
" for irrigation, I intimate no opinion." Page 290.

3 Kent's Commentaries (ninth edition) marginal p. 439, top p. 569:

" Every proprietor of lands on the banks of a
" river has naturally an equal right to the use of
" the water which flows in the stream adjacent to
" his lands as it was wont to run (*currere solebat*),
" *without diminution or alteration.*"

Union Mill and Mining Co. vs. *Ferris;* 2 Sawyer Cir. Ct. Reports, pp. 179, 180:

" We consider it to be entirely clear that be-
" fore the title to these lands was acquired from
" the Government of the United States, no occu-
" pancy or appropriation of the water by either
" party, no state or territorial legislation, or rule
" of decision established by the State courts in

" controversies between occupants of the public
" land, without title from the government, can in
" any manner qualify, limit, restrict, or affect the
" operation of the government patent; that the
" government has a perfect title to the public land,
" and an absolute and unqualified right of dispo-
" sal; that a stream of running water is part and
" parcel of the land through which it flows, insepa-
" rably annexed to the soil, and the use of it as an
" incident to the soil passes to the patentee, who
" can be deprived of it only by grant, or by the
" existence of circumstances from which it is the
" policy of the law to presume a grant; that the
" Government, as proprietor of the land through
" which a stream of water naturally flows, has the
" same property and right in the stream that any
" other owner of land has, be it usufructuary or
" otherwise, and that a statute of limitations does
" not run against the United States. Upon the
" foregoing propositions it is not deemed neces-
" sary to enlarge. They seem incontestable, and
" we shall content ourselves with a reference to
" the case of *Van Sickle* vs. *Haines*, 7 Nev., R.
" 249, wherein the authorities are collected and
" the law stated in the clearest and most satisfac-
" tory manner; and the case of *Gibson* vs. *Chou-*
" *teau*, 13 Wall, 93. In *Van Sickle* vs. *Haines*,
" the Court held: That the United States is the
" absolute and unqualified proprietor of all the
" public land to which the Indian title has been
" extinguished; that running water is primarily
" an incident to the ownership of the soil over
" which it naturally flows; that the Government

" patent conveys to its grantee not only the land
" through which a stream naturally flows, but also
" the stream ; that neither territorial nor state
" legislation can in anywise impair or modify the
" right of the Government to the primary dis-
" posal of the soil ; that statutes of limitation do
" not run against the State, so that no use of water
" while the title to the land is in the Government
" can avail the defendant as a foundation of title
" by prescription, or defeat, or modify the title
" conveyed to the grantee by his patent. After
" examination we are constrained to say, in the
" language of Mr. Justice Garber in that case,
" that 'not only the weight of authority, *but all*
" '*the authorities support these propositions.*' "

Wood on Nuisances, Sec. 337 : " The right of
" a riparian owner to the use of the water that
" flows by his land is a right to its use in its
" natural condition, both as to quality and quan-
" tity, and also to its natural momentum of fall
" and power, and while an upper riparian owner
" may erect a dam, and apply the water to a
" beneficial use, and may use all the water, if he
" still permits it to flow in its accustomed channel
" to the land of the lower proprietors, yet the
" property in the water is not divisible, and one
" proprietor may not take what he regards as,
" and what in reference to the right to use the
" water as to other proprietors on the same dam,
" his specific share thereof would be, and divert
" it from another's land. Such a use of the
" water would create an actionable nuisance." *

"SEC. 338. Water courses are streams of "water flowing in a defined channel between "banks, and are either natural or artificial, and "embrace all running streams from the little "rivulet that dances noiselessly along its tiny "pathway, to the swift running and noisy river "that rushes with unresistless fury over and "through a vast expanse of territory, bearing on "its bosom the products of the country through "which it traverses, to the markets of the world. It "is not necessary that the water flow continuously. "If there be a defined channel, and water flows "in that channel at certain seasons of the year, "while at others it is dry, this is a water-course "within the legal import of the term."

Crooker vs. *Bragg*, 10 Wend., p. 266.

"A person through whose farm a stream natur-"ally flows is entitled to have the whole pass "through it, though he may not require the "whole or any part of it for the use of machinery. "Upon any other principle this right to the "stream, which is as perfect and indefeasible as "the right to the soil, would always depend upon "the use, and a party who did not occupy the "whole for special purposes, would be exposed "to have the same diverted by his neighbor above "him, without remedy, and which diversion by "twenty years enjoyment would ripen into a pre-"scriptive right beyond his control, and thereby "defeat any subsequent use."

Gardner vs. *Village of Newburgh*, 2 Johnson's Chancery Reports, p. 164.

" It is a clear principle in law that the owner " of land is entitled to the use of a stream of wa- " ter which has been accustomed, from time im- " memorial to flow through it, and the law gives " him ample remedy for the violation of this right. " To divert or obstruct a water-course is a private " nuisance; and the books are full of cases and " decisions asserting the right and affording the " remedy."

Same case, pp. 165–166.

" A right to a stream of water is as sacred as a " right to the soil over which it flows. It is a " part of the freehold of which no man can be " disseized 'but by lawful judgment of his peers, " 'or by due process of law.' This is an ancient " and fundamental maxim of common right to be " found in *magna charta*, and which the Legisla- " ture has incorporated into an act declaratory of " the rights of the citizens of this State."

Newhall vs. *Ireson*, 8 Cush., 599, Shaw, C. J.

" This was an unwarrantable and injurious use " of a common right to a watercourse, running in " its natural channel, through the lands of several " different proprietors. The rule of law is well " settled; that each of such proprietors has a " right to a reasonable and beneficial use of the " current as it passes through his own land; but " he has no right to divert or corrupt it, so as to

" prevent the proprietor below him from having
" and enjoying the same use, for all usual and
" beneficial purposes. This substantial diversion
" of the watercourse, therefore, was unwarranted
" by any right of the defendants, as proprietors
" above, was an encroachment on the rights of the
" plaintiff, and prejudicial to her estate. And al-
" though the plaintiff has sustained no present
" damage, because she has had no mill upon it,
" or otherwise used it for any agricultural or
" manufacturing purpose, yet such diversion
" would prevent such beneficial use of it here-
" after, and thus impair the value of the estate.
" It is, therefore, a case where an action can be
" maintained to vindicate the plaintiff's right, and
" to prevent a loss of it by adverse possession
" and lapse of time."

Johns vs. *Stevens et al*, 3 Vermont, 315.

"The general principle with respect to the
" rights of proprietors of lands through which a
" stream passes, is, that each has an equal right
" to the use of the water, in its natural course,
" *without diminution or alteration;* and neither
" has a right to use or obstruct the water to the
" prejudice of other proprietors, unless he has
" acquired a title to some exclusive enjoyment,
" by an actual appropriation and use of the water,
" in this State, for fifteen years, in some particu-
" lar manner."

Blanchard and Weeks, Leading Cases on Mines, Minerals, and Mining Water Rights, pp. 716–717:

" The proprietors of the banks adjoining a navigable water-course have a right to use the water, as well as the land, in any way consistent with the enjoyment of the easement which the public has in it, and neither the public—that is, the State—nor any individual has the right to *divert* the stream, and render it useful to the owners of the soil. (*Ibid; Tyler* vs. *Wilkinson*, 4 Mason, 397).

" In the last mentioned case, Mr. Justice Story gave a masterly exposition of the English, which is the same as the American, law of riparian proprietorship. This statement of the American jurist has been adopted by English writers and judges as the clearest of any on the subject. Mr. Collier, an English lawyer, in his valuable little treatise on mines, has given Justice Story the sole credit of the statement in *Tyler* vs. *Wilkinson*, and gives the language of that jurist in preference to that of any English judge, although the decision of Story was preceded some three years by a judgment by Sir John Leach, then Vice-Chancellor (1823) in which the same principles were enunciated, and the same subjects, viz., riparian rights and running waters, were briefly discussed."

Silver Spring Bleaching and Dyeing Co. vs. *Waukuck Co.*, 15 Reporter, 94, (Supreme Ct. R. I., 1882).

" The right of every owner of land bordering " on a stream to the use of the water is well set- " tled; and the fact that he also owns a mill does " not lessen his rights. *Prima facie*, he owns to " the centre of the stream, *and if he owns on both " sides, owns the whole of the land under it.* And " he has a right to have the water pass his land " in its natural pure state. Pollution to be the " subject of a suit must of course be appreciable. " And we feel bound to reaffirm the decision here- " tofore made in the case of *Richmond Manf. Co.* " vs. *Atlantic Delaine Co.*, 10 R. I., 106, and the " principles there set forth.

" *But the respondent contends that while this " might be very good law in former days, when we " were simply an agricultural people, and the wa- " ter was only used for drinking, domestic washing, " and the watering of horses and cattle, there has " been a complete change of circumstances; that we " are largely interested in manufactures, and the " wealth of the State depends mainly on their pros- " perity; and that the lesser use should give way to " the more valuable use; and it instances our old " flowage laws.* These laws, however, did not " affect the purity of the water. When the coun- " try was first settled, a grist-mill to grind corn, " and a saw-mill to saw timber, were absolutely " necessary to the existence of the settlers. Bread " and cabins, or houses of some sort, they must " have. Afterwards, but not until the lapse of

" many years, the grist-mill and saw-mill ponds
" were used to carry mill machinery, and the law
" gradually came to be construed so as to jus-
" tify it."

" *The right of the riparian owner, be he farmer*
" *or mill owner, to have the water pass his land in*
" *its natural state, and to a certain use of it as it*
" *passes, not, however, injuring it for the use of*
" *others, is just as much his property as the land*
" *itself. This Court cannot alter the law. Nor*
" *can the legislature take this right from him any*
" *more than it can take his land.* If needed for
" public use, the State can take this right upon
" making compensation. But they cannot take
" it, or which is in this case the same thing, the
" use of it from one man and give it to another
" for private purposes, even on the latter's paying
" for it. That may be a matter of private agree-
" ment, but the State can interfere only to pro-
" tect the rights of all parties, not to take them
" away."

Smith vs. *City of Rochester*, 92 N. Y., 473, 479, 481, 487.

" The riparian owners of lands adjoining fresh
" water, non-navigable streams, take title *ad usque*
" *filum aquæ*, to the thread of the stream, and
" thereby acquire the right as incident to such
" title to the usufructuary enjoyment of the undi-
" minished and undisturbed flow of such water.
" 'Fresh rivers of what kind soever do of com-
" mon right belong to the owners of the soil ad-
" jacent,' is the expressive language of the com-

" mon law, and is of universal application.
" (*Clinton* vs. *Myers*, 46 N. Y., 511; 7 Am. Rep.,
" 373; *Chenango Bridge Co.* vs. *Paige*, 83 N. Y.,
" 178; 38 Am. Rep. 407.)

" The plaintiffs have shown title to the several
" premises occupied and enjoyed by them as mill-
" owners upon the banks of a non-navigable
" stream, which entitles them to the uninterrupted
" flow of its waters in the channel of the stream
" contiguous to their respective premises as it had
" been accustomed to flow. (*Gardner* vs. *Vil. of*
" *Newburgh*, 2 Johns. Ch., 162; *Reid* vs. *Gifford*,
" Hopk., 416; *Brown* vs. *Bowen*, 30 N. Y., 519;
" *Pixley* vs. *Clark*, 35 Id., 520; *Varick* vs. *Smith*,
" 5 Paige, 137.) Their right to maintain an ac-
" tion to restrain the infringement of any rights
" of property which they possess as riparian
" owners is unquestionable. (*Gardner* vs. *Vil. of*
" *Newburgh*, *supra*; *Corning* vs. *Troy Iron and*
" *Nail Factory*, 40 N. Y., 191; *The West Point*
" *Iron Co.* vs. *Reymert*, 45 Id., 703; *Garwood* vs.
" *N. Y. C. & H. R. R. Co.*, 83 Id., 404; *Yates*
" vs. *Milwaukee*, 10 Wall, 504.") p. 473.

" The rule of common law is concisely stated
" in the note above referred to as follows: 'Rivers
" ' not navigable—that is, fresh rivers of what kind
" ' soever—do, of common right, belong to the
" ' owners of the soil adjacent to the extent of
" ' their land in length. But salt rivers, where
" ' the tide ebbs and flows, belong of common
" ' right to the State. That this ownership of the
" ' citizen is of the whole river, viz., the soil and
" ' the water of the river, except that in his river

" ' where boats, rafts, etc., may be floated to mar-
" ' ket, the public have a right of way or ease-
" ' ment.' (p. 479.)

" It is not claimed that the Legislature has
" ever changed or modified the common law rules
" on the subject under consideration by express
" legislation or direct action looking to their limi-
" tation. The only grounds for a denial of their
" application to the subject in this country is *on*
" *account of their alleged inapplicability to the larger*
" *bodies of water possessed by our people* and the
" action of the Legislature in assuming the own-
" ership of the lands under the waters of the Mo-
" hawk and the Hudson rivers above tidewater.
(p. 481.)

" The evidence in this case tended to show
" that the plaintiffs were injured by the act of the
" defendant in diverting the water of Honeoye
" Creek, which had theretofore been accustomed
" to flow in its channel to the benefit of the mill-
" owners on that stream. *This Court must as-*
" *sume that some damage occurred to the parties*
" *who were illegally deprived of their paoperty.*

* * * * * * * *

" *It is enough that the plaintiffs have a clear*
" *legal right which has been invaded,* and the right
" to try the question of the extent of their injury
" has been denied them. It is possible that, upon
" all the circumstances of the case, the Court be-
" low may, in the exercise of their discretion, deny
" a remedy by injunction, or grant it upon terms

" and conditions such as in their judgment will
" best preserve the rights and interests of the par-
" ties." (p. 487.)

The most recent work on the law of Riparian Rights is an American text book, *Gould on Waters*, published in 1883, in which are collectedthe latest authorities upon that subject.

Gould on Waters, Sec. 204, p. 360, 361.

" The right to the use of the water in its nat-
" ural flow, is not a mere easement or appurten-
" ance, but is inseparably annexed to the soil it-
" self. It does not depend upon user, or presumed
" grant from long acquiesence in the part of other
" riparian proprietors above and below, but exists
" *jure naturæ* as parcel of the land. It is not
" suspended or destroyed by mere non-user, al-
" though it may be extinguished by the long-con-
" tinued adverse enjoyment of others. It is not
" affected by the use to which the water has been
" or may be applied."

In support of these propositions, Gould cites in his notes some twenty cases.

Gould on Waters, Sec. 226.

" At common law, the right of every riparian
" proprietor to the use of the stream is an incident
" to the ownership of the land bordering upon the
" stream, and arises *ex jure naturæ*. The right
" exists whether it is exercised or not, and the
" riparian proprietor may begin to exercise it
" when he will."

The Civil Law as to Riparian Rights.

The word "riparian" was introduced from the Civil Law, and the same doctrine of riparian rights will be found to exist in that system as exists in our own. The Code Napoleon says:

"He whose property borders on a running water, "other than that which is declared a dependency "on the public domain by Art. 538, under the "title of 'The distinction of Property,' may em- "ploy it in its passage for the watering of his "property. He whose estate is intersected by "such water, is at liberty to make use of it within "the space through which it runs, but on condi- "tion of restoring it at the boundaries of his field "to its ordinary course."

Code Napoleon, Book 2, Title 4, Art. 644.

The following translation from Escriche shows the Spanish law upon the subject under consideration. *Escriche Title Aqua*, IV, p. 110:

"The water flowing from spring heads and "sources constitutes running water, *aqua profluens*, "and belongs as common property to the first "who occupies it to whatever extent he has need "of it.

"The first persons who can occupy it are the "owners of the estates which such water irrigates "or traverses."

* * * * * * *

"When the water passes through the interior "of an estate, the owner can use it at his pleas- "ure; because, since the banks are his own, he

" is not bound to look out for the interest of an-
" other riparian proprietor " (referring to an owner on the opposite bank, when the stream was a boundary between them) ; " but on its leaving his
" estate he must restore it to its natural or ordi-
" nary course, and he has not the right to absorb
" it entirely or consume it, or to give it another
" direction ; because it is not his, in respect to
" ownership, but only in respect to the use which
" he can make of it as it passes.

" Inasmuch as every riparian proprietor can
" make use of the water which passes along the
" border of his estate—to irrigate the same—it is
" clear that he can open canals, ditches or troughs,
" and also build a dike, a dam or other work to
" catch or raise the water on his estate, provided
" that he does not make it flow back upon the
" lands above, against the will of the owners
" thereof, or inundate the fields below, or descend
" in such a way as to cause destruction ; nor may
" he detain it in such a way that the neighbors
" are deprived of their accustomed irrigation."

The same doctrine is laid down in the Code of Louisiana, Art. 657 :

" He whose estate borders on running water
" may use it as it runs, for the purpose of water-
" ing his estate, or for other purposes. He
" through whose estate water runs, whether it
" originates there, or passes from lands above,
" may make use of it while it runs over his land,
" but he cannot stop nor give it another direction,

" and is bound to return it to its ordinary channel,
" where it leaves his estate."

We know of no State in which the doctrine of appropriation, as claimed by the defendants, prevails, except Colorado. In that State, by legislation and by its constitution of 1876, a peculiar system as to irrigation and the appropriation of water was adopted. The Territorial Legislature of Colorado, in 1864, enacted:

" Nor shall the water of any stream be diverted
" from its original channel to the detriment of any
" miners, mill-men, or others along the line of
" said stream, *who may have a priority of right.*
" And there shall be at all times left sufficient
" water in said stream for the use of miners and
" manufacturers along said stream."

Session Laws of Colorado, 1864, p. 58, Sect. 32.

The Constitution of Colorado of 1876 declares, under the head of " Irrigation," as follows:

" Sec. 5. The water of every natural stream
" not heretofore appropriated within the State of
" Colorado, is hereby declared to be the property
" of the public; and the same is dedicated to the
" use of the people of the State, subject to appro-
" priation as hereinafter provided.

" Sec. 6. The right to divert the unappro-
" priated waters of any natural stream to benefi-
" cial uses shall never be denied. Priority of
" appropriation shall give the better right as be-
" tween those using the water for the same pur-

" pose; but when the waters of a natural stream
" are not sufficient for the service of all those
" desiring the use of the same, those using the
" water for domestic purposes shall have the pref-
" erence over those claiming for any other pur-
" poses, and those using the water for agricultural
" purposes shall have preference over those using
" the same for manufacturing purposes."

Federal and State Constitutions, by Ben Perley Poore, Part I, p. 244, Secs. 5 and 6.

Decisions of the Supreme Court of Colorado: *Coffin* vs. *The Left-Hand Ditch Co.*, 11 P. C. L. J., 417; *Thomas* vs. *Guiraud*, 16 Reporter, 201.

The Common Law California Adopted.

The various States adopted the common law in various modes and by various statutes. These are spoken of in *1 Kent Com.*, (marginal page, 473; top page, 532), note b, as follows:

" The Constitution of New York of 1777 de-
" clared that such parts of the common law of
" England, and of the statute law of England and
" Great Britain, as, together with the acts of the
" Colonial Legislature, formed the law of the Col-
" ony on the 19th of April, 1775, should continue
" to be the law of the State. * * * * The
" common and statute law of England prior to
" the fourth year of James I., and of a general
" nature, were adopted by the convention of Vir-

"ginia in 1776. * * * * In the Revised "Statutes of Illinois, published in 1829, it was "declared that the common law of England and "the English statutes, of a general nature, made "in aid of it prior to the fourth year of James I., "with the exception of those concerning usury, "were to be rules of decision until repealed. In "1818, the common law was adopted by statute "in the State of Indiana, and, in 1835, in Mis-"souri under the same limitations; and it is un-"derstood that the common law and the statute "law of England down to the year 1776, and "applicable to their constitution and circum-"stances, are the law in the States of Mississippi "and Georgia. * * * * So the common "law of England and the statute law of England "prior to 1760 were adopted by statute in Ver-"mont, so far as they were not repugnant to the "constitution or statute law of the State."

Kent says: "The best evidence of the common "law is to be found in the decisions of the Courts "of Justice, contained in numerous volumes "of reports, and in the treatises and digests of "learned men, which have been multiplying from "the earliest periods of the English history down "to the present time."

1 Kent's Com., 533 (marg. page 473).

There was a great controversy in 1850 in California among the small body of lawyers that existed here at that time, whether the common law

or civil law should be adopted. The Legislature was sitting in San José, and petitions were sent there by the respective advocates of the one system and of the other. Mr. Edmund Randolph was the leader of the party that desired to have the civil law adopted in this State; and the few common-law lawyers who were here at that time selected Mr. Nathaniel Bennett to write a report, and to submit it to the Legislature upon the adoption of the common law. At the end of the first volume of California Reports, Mr. Bennett's able report upon the merits of the common law (which was adopted by the Judiciary Committee of the Senate, as their report), will be found. Mr. Bennett asked the Legislature to adopt what he calls the American common law.

Appendix, 1st Cal. Reports:

" In Senate, February 27, 1850.

" The Committee on the Judiciary to whom " was referred the petition of certain members of " the bar of San Francisco, beg leave respectfully " to report,

" That they have had the same under conside- " ration, and have given the subject of which it " treats that serious attention which its magnitude " seems to demand. The petition, praying as it " does, that the Legislature will retain, in its sub- " stantial elements, the system of the civil law, " distinctly presents the alternative of the adop- " tion of the common, or of the civil law as the " basis of the present and future jurisprudence of " this State. A choice between these two differ-

" ent, and, in many respects, conflicting systems,
" devolves upon this Legislature; and, we think,
" we do not over-estimate the importance of the
" subject, in expressing our conviction that this
" choice is the most grave and serious duty which
" the present Legislature will be called upon to
" perform. It is, in truth, nothing less than lay-
" ing the foundation of a system of Laws which,
" if adapted to the wants and wishes of the Peo-
" ple, will, in all probability, endure through gen-
" erations to come—which will control the busi-
" ness transactions of a great community—which
" will direct and guide millions of human beings
" in their personal relations—protect them in the
" enjoyment of liberty and property—guard them
" through life, and dispose of their estate after
" death. Actuated by these considerations, your
" Committee have felt it their duty to submit to
" the Senate a more full and detailed Report upon
" the matter referred to them, than they should
" otherwise have felt themselves justified in do-
" ing." (p. 588.) * * * * *

" But before entering upon the subject in de-
" tail, we would premise, that no one for a moment
" entertains the idea of establishing in California
" the whole body of either the Common or the Civil
" Law. There are, in each, principles and doc-
" trines, political, civil and criminal, which are re-
" pugnant to American feelings, and inconsistent
" with American institutions. Neither the one nor
" the other has ever been, or ever can be, unquali-
" fiedly adopted by any one of the United States.
* * * * * * * p. (590).

"Such is the wonderful complexity of human
" affairs; a complexity which must always increase
" more and more in proportion to the advance of
" commerce, of civilization, and of refinement;
" that of the immense multitude of questions
" which are brought before Courts for adjudica-
" tion; but very few arise under, or are depend-
" ent upon, or can be controlled by Constitutions
" or express statutory laws. (p. 590, 591.) * *
" The question naturally presents itself here,
" What is the Common Law? * * *
" The Common Law is that system of jurispru-
" dence which, deducing its origin from the tradi-
" tionary customs and simple laws of the Saxons,
" becoming blended with many of the customs
" and laws of the Normans, enriched with the
" most valuable portions of the Civil Law, mod-
" ified and enlarged by numerous Acts of the
" English Parliament; smoothed in its asperities
" and moulded into shape by a succession of as
" learned and wise and sagacious intellects as the
" world ever saw, has grown up, during the lapse
" of centuries, under the reformed religion and en-
" lightened philosophy and literature of England,
" and has come down to us, amended and improved
" by American legislation, and adapted to the re-
" publican principles and energetic character of the
" American people. To that system the world is
" indebted for whatever it enjoys of free govern-
" ment, of political and religious liberty, of un-
" trammelled legislation, and unbought adminis-
" tration of justice. To that system do we now
" owe the institution of trial by jury, and the

" privileges of the writ of habeas corpus, both
" equally unknown in the Civil Law. Under that
" system all the great branches of human in-
" dustry—agriculture, commerce, and manufac-
" tures—enjoy equal protection and equal favor;
" and under that, less than under any scheme
" ever devised by the wisdom of man, has per-
" sonal liberty been subject to the restrictions and
" assaults of prerogative and arbitrary power.
" (p. 591, 592.) * * * Wherever the
" English flag has been unfurled upon a savage
" or hostile shore, possession has been taken in
" the name of its sovereign, and in behalf of
" its laws; and upon whatever coast an English
" colony has been planted, there also have the
" colonists established the Common Law, and
" have ever afterwards clung to it as the birth-
" right of themselves and their children, with a
" tenacity that no power, no suffering, no fear of
" danger, no hope of reward, could induce them
" to relax. (p. 593.) * * * It is also
" urged that something is due to the rights of
" the people who became a part of the American
" Union by the acquisition of California. Un-
" doubtedly the same respect should be paid to
" their interests, that is awarded to all the citizens
" of this State. (p. 599.) * * *

" But there are additional reasons of still greater
" cogency for the adoption of the Common Law.
" Of the thirty States in the Union, twenty-nine
" are governed by the Common, and one by the
" Civil Law. More than twenty-nine-thirtieths
" of the citizens of the United States have been

" brought up under, and accustomed to transact
" their business in conformity with, the principles
" of the former system. More than twenty-nine-
" thirtieths of the emigration to this country, is
" from Common Law States; and an equal pro-
" portion of the business of our people, is now,
" and will continue to be, carried on by Common
" Law men. If you change this system, which,
" in all ordinary matters, they sufficiently under-
" stand, you draw a cloud of doubt and uncertainty
" over every department of business. (p. 602) *

The report discusses at large the respective merits of the Civil and Common Law, and concludes in these words: "And that, in cases not
" falling within the Constitution of the United
" States, or the Constitution or statutes of this
" State, the Courts shall be governed in their ad-
" judications by the English Common Law as
" received and modified in the United States; in
" other words, by the American Common Law."
(p. 604.)

Upon this report, the first Legislature of California passed the following statute:

" An Act adopting the Common Law, passed
" April 13th, 1850.

" The people of the State of California, repre-
" sented in Senate and Assembly, do enact as
" follows: The Common Law of England, so far
" as it is not repugnant to, or inconsistent with,
" the Constitution of the United States, or the
" Constitution or Laws of the State of California,

" shall be the rule of decision in all of the Courts
" of this State."

Cal. Statutes of 1850, p. 219.

The present Political Code of California, Section 4468, says: "The Common Law of England, " so far as it is not repugnant to, or inconsistent " with, the Constitution of the United States, or " the Constitution or Laws of this State, is the " rule of decision in all of the Courts of this " State."

What is meant by this adoption of the common law? Does it mean, when you are adverting to the subject of water rights, that you have got to take the decision of a Judge of 300 years ago, or that you have got to take the decision of a common law Judge of modern times, who decides upon the same subject matter, upon the same tenure, under the same existing conditions? In adopting the common law, are you not to get the benefit of modern common law decisions; or, must you take the decisions of olden time as evidence of what the common law is? On the contrary, as we understand it, judicial decisions are continually modifying and moulding the common law, and the law is moulded by these decisions just as thoroughly and completely as by express statute. When the common law was adopted in 1850 by the State of California, the rule of riparian rights was acknowledged just in the mode we claim it, and to the extent we claim it, both in England and America. Any lawyer then asked whether a proprietor on a

stream had any riparian rights, would have instantly responded, under his common-law education: "Of course, he has, subject to the respective "rights of proprietors on the same stream." The doctrine of appropriation, as conferring superior rights to those of riparian proprietorship, was, in 1850, an entirely unknown doctrine to the judges of the country, and so it was to the English judges at that time. There was no such thing known in the common law of California on April 13th, 1850, as the doctrine of prior appropriation of water conferring prior right as against the riparian owner. The common law doctrine of riparian rights is declared by the U. S. Supreme Court as follows:

Railroad Company vs. *Schurmeir*, 7 Wallace, 288, 289:

"The Court does not hesitate to decide, that "Congress, in making a distinction between "streams navigable and those not navigable, in-"tended to provide that *the common law rules of* "*riparian ownership should apply to lands border-*"*ing on the latter;* but that the title to lands "bordering on navigable streams should stop at "the stream, and that all such streams should be "deemed to be and remain public highways. "Although such riparian proprietors are limited "to the stream, still they also have the same right "to construct suitable landings and wharves for "the convenience of commerce and navigation, as "is accorded to riparian proprietors bordering on "navigable waters affected by the ebb and flow "of the tide."

We do not find in any case in America, save in Colorado (based upon its peculiar statutes and constitution), the proposition enunciated that the doctrine of riparian rights is inapplicable to our circumstances, or to the physical condition of our country, except in reference to mining operations upon the public lands of the United States.

The Federal Decisions and Statutes.

The first of the federal decisions upon the subject of the appropriation of water was *Atchison* vs. *Peterson,* 20 Wallace. This was a case between two appropriators, and cannot possibly have any application to the present case. It related to the public lands of the United States. The Court held that there must not only be priority of possession, but it must be recognized and acknowledged by the local customs, laws and decisions of the Courts. The opinion is by Judge Field.

On page 511 he says :

" As respects the use of water for mining pur-
" poses, the doctrines of the Common Law de-
" claratory of the rights of riparian owners were,
" at an early day, after the discovery of gold,
" found to be inapplicable, or applicable only in
" a very limited extent to the necessities of
" miners, and inadequate to their protection. By
" the Common Law, the riparian owner on a
" stream not navigable, takes the land to the cen-
" ter of the stream, and such owner has the right

" to the use of the water flowing over the land as
" an incident to his estate."

* * * * * *

"This equality of right among all the proprie-
" tors on the same stream would have been in-
" compatible with any extended diversion of the
" water by one proprietor, and its conveyance for
" mining purposes to points from which it could
" not be restored to the stream. But the Gov-
" ernment being the sole proprietor of all the
" public lands, whether bordering on streams or
" otherwise, there was no occasion for the appli-
" cation of the Common Law doctrine of riparian
" proprietorship with respect to the waters of
" those streams. The Government, by its silent
" acquiescence, assented to the general occupation
" of the public lands for mining, and to encourage
" their free and unlimited use for that purpose, re-
" served such lands as were mineral from sale, and
" the acquisition of title by settlement. And he
" who first connects his own labor with property
" thus situated and open to general exploration,
" does, in natural justice, acquire a better right to
" its use and enjoyment than others who have
" not given such labor. So the miners on the
" public lands throughout the Pacific States and
" Territories, by their customs, usages and regu-
" lations, everywhere recognized the inherent
" justice of this principle; and the principle it-
" self was, at an early period, recognized by leg-
" islation, and enforced by the Courts in those
" States and Territories." p. 512.

* * * * * *

" This doctrine of right by prior appropriation
" was recognized by the legislation of Congress in
" 1866. The Act granting the right of way to
" ditch and canal owners over the public lands
" and for other purposes, passed on the 26th of
" July of that year, in its ninth section declares
" ' that whenever, by priority of possession, rights
" ' to the use of water for mining, agricultural,
" ' manufacturing, or other purposes, have vested
" ' and accrued, and the same are recognized and
" ' acknowledged by the local customs, laws and
" ' decisions of Courts, the possessors and owners
" ' of such vested rights shall be maintained and
" ' protected in the same.' " p. 512, 513.

In that case the point of the decision simply is, that as between two appropriators, and in view of the Act of Congress of July, 1866, the prior appropriator has the better right

That was followed by the case of *Basey* vs. *Gallagher*, 20 Wallace, 681-682, which applied the doctrine of appropriation to agricultural lands, *but under the wording of the Act of Congress.* This was also a case between two appropriators, no question of the ownership of land being involved.

" The question on the merits in this case is
" whether a right to running waters on the *public*
" *lands* of the United States for purposes of irri-
" gation can be acquired by prior appropriation,
" as against parties not having the title of the
" Government. Neither party has any title from
" the United States, and no question as to the

" rights of riparian proprietors can therefore arise.
" It will be time enough to consider those rights
" when either of the parties has obtained the pat-
" ent of the Government. At present both par-
" ties stand upon the same footing; neither can
" allege that the other is a trespasser against the
" Government without at the same time invalid-
" ing his own claim."

And then the Court refer to *Atchison* vs. *Peterson*, and say :

" We had occasion to consider the respective
" rights of miners to running waters on the mineral
" lands of the public domain ; and we there held
" that by the custom which had obtained among
" miners in the Pacific States and Territories, the
" party who first subjected the water to use, or took
" the necessary steps for that purpose, was re-
" garded, except as against the Government, as the
" source of title in all controversies respecting
" it," etc.

Last mentioned case was followed by the case of *Jennison* vs. *Kirk*, 8 Otto, 454. This was also a case between appropriators, and the proposition is laid down there, which is not, and cannot possibly be true as a matter of fact, that :

" For eighteen years, from 1848 to 1866, the
" regulations and customs of miners, as enforced
" and moulded by the Courts and sanctioned by the
" legislation of the State constituted the law gov-
" erning property in mines and in water on the
" public mineral lands." page 458.

Well, we venture to say, that such a thing as a mining ditch in California was never known in the year 1848, or the year 1849, and there never was a mining ditch built in California until the latter part of 1850; and you cannot find a case in the California Reports which speaks of a mining ditch even being projected earlier than the fall of 1850; yet this last case speaks about usages and customs as to mining ditches in 1848 and 1849. We are looking now to a point of time, September 28, 1850, when the lands in question were granted by the United States to this State, to show that at that point of time, no customs or usages had grown up upon this matter of water rights, and this we will show more fully hereafter.

The last case on this subject by the U. S. Supreme Court is the case of *Broder* vs. *The Natoma Water Co.*, 11th. Otto, 274.

"The Natoma Water and Mining Company
" owns a canal for conducting water and distribu-
" ting the same for mining, agricultural and other
" uses, which is some fifteen miles long. It was
" completed in the year 1853, and since then has
" been in constant and successful operation, under
" the control and in the possession of the com-
" pany. Its cost was about $200,000. The
" Court of the first instance on the trial of this
" cause found also as a fact that the canal and
" branches have, ever since their construction,
" been uniformly acknowledged and recognized
" by the local customs, laws, and the decisions of
" the Courts of the State of California, in which

"they lie, and that the land covered by them is "indispensable to their use. At the time they "were finished, and for many years after, in fact "up to the passage of the Pacific Railroad Acts "of 1862 and 1864, the land through which they "ran was the public property of the United "States." (p. 274.)

* * * * *

"The inception of the title of plaintiff to the "land described in his petition, other than that "derived from the railroad company, was a de-"claratory statement for pre-emption, filed Au-"gust 6th, 1866, by himself, for one tract, and a "similar statement filed September 14th, 1866, by "his brother Jacob Broder, for another. But "*prior to either of these dates*, to wit: on the "26th of July of the same year, Congress en-"acted a law, the purpose of which was to deal "with the rights of miners who had theretofore, "without objection, and with the tacit encourage-"ment of the United States, discovered, devel-"oped and mined the public lands. 14 Stat., "251. The 9th section of that Act contains this "declaration: 'That wherever, by priority of "'possession, rights to the use of water for min-"'ing, agricultural, manufacturing, or other pur-"'poses, have vested and accrued, and the same "'are recognized and acknowledged by the local "'customs, laws, and the decisions of Courts, the "'possessors and owners of such vested rights "'shall be maintained and protected in the same; "'and the right of way for the construction of "'ditches and canals for the purposes aforesaid,

" ' is hereby acknowledged and confirmed.' (p.
" 253.) As to the canal of the defendant, so far
" as it ran at that date through the land of the
" United States, this Act was an unequivocal
" grant of the right of way, if it was no more.
" As the plaintiff's right to the lands patented to
" him and his brother commenced *subsequently to*
" *this statute*, he took the title subject to this right
" of way, and cannot now disturb it. (p. 275.)

Then the Court goes on to speak of the railroad grant. Part of these lands were held under the railroad grant, and the railroad grant antedated the Act of Congress of 1866.

" In reference to his lands held under convey-
" ance from the railroad company, it might be a
" question of some difficulty whether the right was
" so far vested in that company before the pass-
" age of this Act of 1866, that the latter would be
" ineffectual as regards these lands. But we do
" not think that the defendant is under the necessity
" of relying on that statute." (pp. 275, 276.) * *

" We are of opinion that the section of the Act
" which we have quoted was rather a voluntary
" recognition of a pre-existing right of possession,
" constituting a valid claim to its continued use
" than the establishment of a new one. This sub-
" ject has so recently received our attention, and
" the grounds on which this construction rests are
" so well set forth in the following cases, that they
" will be relied on without further argument:

" *Atchison* vs. *Peterson*, 20 Wall., 507;
" *Basey* vs. *Gallaher*, *Id.*, 670;

" *Forbes* vs. *Gracey*, 94 U. S., 762 ;
" *Jennison* vs. *Kirk*, 98 *Id.*, 453.

" We turn now to the Act of July 2, 1864 (13
" Stat., 356), which makes the final grant to the
" Pacific Railroad Companies, the acceptance of
" which by the companies bound them to its
" terms ; and we find in section 4, which enlarges
" the grant of lands made by the Act of 1862,
" this clause of reservation from the general terms
" of the grant : 'Any lands granted by this Act,
" ' or the Act to which this is an amendment,
" ' shall not defeat or impair any pre-emption,
" ' homestead, swamp-land, *or other lawful claim*,
" ' nor include any Government reservation, or
" ' mineral lands, or the improvements of any *bona*
" ' *fide* settler on any lands returned or denomi-
" ' nated as mineral lands, and the timber neces-
" ' sary to support his said improvements, as a
" ' miner or agriculturist." (p. 358.)

" We have had occasion to construe a very
" common clause of reservation in grants to other
" railroad companies, and in aid of other works of
" internal improvements ; and in all of them we
" have done so in the light of the general princi-
" ple that Congress, in the act of making these
" donations, could not be supposed to exercise its
" liberality at the expense of pre-existing rights,
" which, though imperfect, were still meritorious,
" and had just claims to legislative protection.

* * * * * * *

" In construing the grant to the Pacific Rail-
" road Companies, this principle is eminently ap-

" plicable. The lands were vastly greater in
" extent than those embraced in any previous
" grant, and surrounded by much more varied
" circumstances. The number and diversified
" character of the interests which might be
" affected largely exceeded any with which Con-
" gress had theretofore dealt. * * * *

" Not only are prior reservations made by the
" Government and rights of pre-emption excepted,
" but the improvements of *bona fide* settlers on
" land returned or denominated mineral lands, and
" the timber necessary to support the miners' im-
" provements, *and any other lawful claim*, are un-
" affected by the grant. Of course, this means
" any honest claim evidenced by improvements
" or other acts of possession."

The Court therefore, in that case of *Broder* vs. *Water Co*, while it uses some language as to the right of the defendant, independent of the Act of of 1866, substantially decides as to plaintiff's title, as follows:

Your grant from the railroad was an imperfect grant. So far as these lands of the Natoma Company were concerned, it did not take them in. They were excepted from the grant; and so far as your pre-emption is concerned, that was located subsequent to the Act of July 26th, 1866, and therefore you can take no title as against the prior settlement on the public land, which was made and sanctioned by that Act. The Pacific Railroad grant antedated the Act of 1866, being made in 1862 and 1864; but you take nothing by that,

because lands of this character were excepted from its operation. You take nothing by your pre-emption, because your pre-emption was subsequent to the passage of the Act of July, 1866, which recognizes these rights on our public lands. The whole case was simply this: The United States had authorized this water company to take up these lands before any of your rights accrued, and when you subsequently got your pre-emption, you could not deprive this locator of these rights which the United States had given him under the statute of 1866.

Now, that is a summary of all the Federal decisions upon this subject. By the subsequent statute of 1870, Congress distinctly provided that patents should be made subject to these settlements. We refer to the U. S. Statute of July 9th 1870, to be found in *Copp's Mining Decisions*, 296, 297. This was an Act supplementary to the Act of July 26th, 1866, and it provided, Sec. 17, "that none of the rights conferred by sections 5 "and 8 and 9, of the Act to which this is amenda-"tory shall be abrogated by this Act." (That was referring to the Act of 1866.) "And the "same are hereby extended to all public lands af-"fected by this Act and all patents granted or "pre-emptions or homesteads allowed, shall be "subject to any vested and accrued water rights "or rights to ditches and reservoirs used in con-"nection with such water rights as may have "been acquired under or recognized by the 9th "section of the Act of 1866."

It will now be perceived, that the Federal decisions have never adjudicated the precise question presented here. The United States had in reference to its public lands legislated, and not only given rights to appropriators of water on the public domain, but had provided that all patents granted should be issued subject to those rights.

Mining Customs and Usages Previous to September 28, 1850.

Gold was discovered in this State by Mr. Marshall, at Coloma, in El Dorado County, in January, 1848. The American emigration came to California in 1849 and the early part of 1850. The large mass of emigration was by steamer, and the very first steamer which arrived here was on the 28th of February, 1849, and the second steamer arrived here in the spring of 1849. Those were the first two steamers that came here. Now, when Judge Field talks about mining customs as to the appropriation of water existing here in 1848, he is wrong in his facts. There was no such thing as mining customs here in the year 1848, and the only customs here as to mines in the year 1849 related to that system of mining which then prevailed, and which was by washing the dirt on the bars of the rivers in pans, which was extended afterwards to the use of a rocker or a "long tom," as it was called. Those operations were carried on in the beds and bars of rivers. The idea of quartz mining and the idea of hydraulic mining, and the idea of that system of mining

which involved the large use of water, was never known or heard of on the 28th of September, 1850. The very first quartz mining in this State that ever was conducted, was in the year 1852, and hydraulic mining was not discovered until years after that time. To talk about a system of customs and usages having grown up here about water rights in 1848 and 1849, to a man who lived here in those days and knew what mining was, and how it was carried on, is idle; there was no want then of any large amount of water in mining. They washed first in the pan, and then they washed in the rocker, and then they washed in the long tom; but as to building canals to get the amount of water necessary for that purpose, the thing was unknown.

You cannot find in any book on the mineral resources of California, mention of a mining ditch built previous to September, 1850.

Whitney, in his "*Geology of California*," page 224, speaks of the time when quartz mining was introduced here.

"Placer mining has been carried on here since "the earliest days of mining in California. Quartz "mining was first attempted as early as 1852."

Brown, in his *Mineral Resources of California*, says, p. 116:

"At first mining was confined to the gravel bars "and beds of the running streams, and as these "were partially exhausted it gradually extended "to the dry ravines, flats and hillsides adjacent. "The rocker was the principle machine used for

" washing the auriferous sands, and separat-
" ing the gold from the lighter particles. Sheet-
" iron pans are now used by American miners for
" prospecting and other purposes. The rocker
" was superceded by the long tom, and the long
" tom in turn gave place to the sluice. This was
" an important improvement, and enabled miners to
" work many claims that would not pay with the
" rocker and longtom."

Now in reference to hydraulic mining:

" Hydraulic mining first came into use in Ne-
" vada County in 1853, and enabled miners to
" work with profit a vast amount of auriferous
" ground that never would have paid by the old
" process. About April, 1852, A. Chabot, mining
" near Nevada City, used a hose of some 35 or
" 40 feet in length, through which water was con-
" conducted from the top of a bank to the bottom
" of his diggins. There was no pipe or nozzle at
" the end, but still it was found to be a great
" saving. So far as known the hose was not
" used that season in any other claim, and it does
" not appear that Chabot discovered the great
" advantage that would result by directing the
" stream of water against the bank; This dis-
" covery was made by E. E. Matteson, a year
" later. In April, 1853, Matteson and his part-
" ner, who were working a claim on American
" Hill, rigged up a hose, attached a nozzle at the
" end, and by directing it against a bank, as
" water is thrown upon a building by a fire-
" engine, found that a small stream of water
" would do the work of 100 men." Same, p. 119.

Quartz mining and hydraulic mining were never known until 1852 and 1853—quartz mining not until 1852, and hydraulic mining not until 1853.

In the statutes of 1850 there is not a word about mining regulations, adopting the customs of miners, or giving them any force or any validity. In the Practice Act of 1851 mining usages received some sanction. It will be seen from the very language of that statute what was the kind of mining which the Legislature understood to be then going on in the State. *Statutes of 1851, p. 149.*

" Section 621. In actions respecting mining " claims, proof shall be admitted of the customs, " usages, or regulations established and in force at " the bar or diggings embracing such claim ; and " such customs, usages, or regulations, when not " in conflict with the Constitution and laws of " this State, shall govern the decision of the ac- " tion."

When not inconsistent with the law, when not inconsistent with the established doctrine of riparian rights—give that its full force ; it does not not extend these customs to agricultural lands ; it does not do as the United States statute of 1866 did, which was passed to meet the exigencies of mining, and the language of which embraced appropriations of water for agricultural as well as for mining purposes. Whenever the State Legislature has recognized mining customs it has been in reference to mining lands, but they have never recognized any customs as to the appropriation of

water for agricultural purposes, and they have never, in any way or shape, construed that provision of the Act of 1851 as changing the doctrine of riparian rights at all, or as substituting for that doctrine the doctrine of prior appropriation. On the contrary, whenever the question of appropriation has come before the Courts of California—the State Courts of California—they have always recognized, as between appropriators, the first appropriator; but they generally state that their decision is not intended to affect the doctrine of riparian rights.

We have examined all the decisions of California in reference to the appropriation of water, and we find in but two decisions any mention of a ditch as early as the year 1850. The earliest ditch mentioned, that we know of, is in the case of

Kidd vs. *Laird*, 15 Cal., 163;

There the dates of six ditches are given; the earliest of which was made in the fall of 1850. The Deer Creek and Coyote ditches were constructed in the fall of 1850—the Deer Creek ditch in the spring of 1851; the Gold Flat ditch the last of 1851 or the first of 1852; the Snow Mountain ditch in 1853, finally completed in the spring of 1854; Laird's new ditch in 1855; the enlargement of the Deer Creek ditch in 1852, '53, and '54. The earliest ditches spoken of there are in the fall of 1850.

The following cases relate to mining ditches, and the date of the construction of the particular

ditch in question is generally given in the report of the case:

The Nevada Water Co. vs. *Powell*, 34 Cal., 109.

The ditch was *located* in 1850, page 115.

McDonald vs. *Bear River Co.*, 13 Cal., 226.

The date of the ditch was June, 1851.

Morris vs. *Bicknell*, 7 Cal., 261.

The date of the ditch was the fall of 1851.

White vs. *Todd Valley Water Co.*, 8 Cal., 443.

The date of the ditch is 1851.

Ortman vs. *Dixon*, 13 Cal., 37.

The date of the ditch is the fall of 1851.

Kelly vs. *Natoma Water Co.*, 6 Cal., 105.

The date of the ditch is 1852.

Crandall vs. *Woods*, 8 Cal., 137.

Water works to supply the town of Grass Valley; date is June, 1852.

Parke vs. *Kilham*, 8 Cal., 78.

The date of the ditch is October, 1852.

Humphreys vs. *McCall*, 9 Cal., 59.

The date of the ditch is July, 1852.

Mokelumne Hill Canal Co. vs. *Woodbury*, 10 Cal., 185.

The date of the canal is November, 1852.

Kimball vs. *Gearhart*, 12 Cal., 44.

The date of the ditch is July, 1853.

Weaver vs. *Conger*, 10 Cal., 233.

The date of the ditch is July, 1853.

Brown vs. *Smith*, 10 Cal., 509.

The date of the ditch is November, 1853.

There is nothing in the California Reports, or in the California Statutes, which indicates that there ever was any canal or mining ditch *in operation* in California previous to September 28, 1850.

There could not be usages and customs and regulations as to the artificial appropriation of water before canals and ditches were constructed for the purposes of such appropriation.

There never was any decision by the Supreme Court of California as to water rights previous to July, 1853. The first case of that character to be found in the California Reports is *Eddy* vs. *Simmons*, 3 Cal., 249.

The counsel for respondents have argued, that before these swamp and overflowed lands were vested in this State, two years before September 28th, 1850, this doctrine of prior appropriation—this modified common law—had been impressed upon them. Now, we cannot understand that a system of law can be impressed upon a piece of land, and that it travels with the land as a mortgage or a covenant running with the land. If the United States Government owned these lands previous to September 28th, 1850, as it undoubtedly did—if, during the time of that ownership, it granted a license, or something more than a license, for a license is revocable, and passes away with the grant of the property—if it had recognized and acknowledged the right of any person acquiring water in ditches by appropriation, at the time it granted the swamp-lands to the State, such recognition might have been a burden upon that

grant to the State, provided always that some one had availed of that license previous to such grant. The argument comes down just to this : Previous to September 28th, 1850, the Government allowed anybody to take up water upon the public lands. These swamp-lands were the public lands of the Government previous to September 28th, 1850. On September 28th, 1850, the Government granted these lands to this State. In 1875, twenty-five years after that grant, the Calloway Canal Co. desired to avail themselves of the license which had existed prior to September 28th, 1850—in other words, to avail of a license which had long since expired, and after the licenser had conveyed away the property. We understand the law to be, that if there was any such license, and if there was any mode of acquiring water rights under the laws or usages of the Federal Government, that license must have been exercised, and that mode of acquisition availed of, while the Federal Government was the owner of the lands ; but just so soon as the Federal Government parted with these lands, as they did by the statutory grant of September 28th, 1850, no one having availed themselves of that liberty or license, the land passed to the State, entirely unincumbered and free, no human being could on the 29th of September, 1850. have availed himself of that license. *A fortiori* no man can come forward 25 years after the State has acquired these lands, and say, " I want to avail myself of a " license which I might have availed myself of 25 " years ago, and before this grant to the State " was made."

In this connection we refer to what was said by the Supreme Court of the United States in the *DeHaro case*, 5th Wallace, 627. That was a case in reference to the Potrero *Nuevo*, a license by the Mexican Government that the De Haro family should occupy that land, and after the acquisition of the country, they endeavored to convert that license into a grant, and to have it confirmed by the Land Commission. It became a very valuable piece of property, and in discussing that license of the Mexican Government and the right of occupation under it, the Court speaks of the effect of a license. The Court say :

"There is a clear distinction between the effect "of a license to enter lands, uncoupled with an "interest, and a grant. A grant passes some es- "tate of greater or less degree, it must be in "writing, and is irrevocable unless it contains "words of revocation, whereas a license is a per- "sonal privilege, can be conferred by parol or in "writing, conveys no estate or interest, and is "revocable at the pleasure of the party making "it. * * * It ceases with the death of "either party, and cannot be transferred or alien- "ated by the licensee. A sale of the lands by "the owner instantly works its revocation, and in "no sense is it property descendible to heirs. "These are familiar and well-settled principles."

We say then, under that familiar and well-established doctrine, that so soon as the Federal Government, by the statute of September 28th, 1850, conveyed this swamp land district to the State,

all questions of unexercised license and liberty under federal laws and federal usages were entirely gone, and from that moment we have got to look only to the State law, and State legislation, to ascertain what rights appropriators had received since September 28th, 1850, from the State, to appropriate waters as against riparian owners.

This being a case of State lands, no patent was necessary to vest the title; as has been many times decided in this State; that the statute of September 28th, 1850, conveyed to the State a present right and title to these lands, and no patent was necessary, and there is no question but that these were swamp and overflowed lands on September 28th, 1850.

After this grant, no legislation by Congress could affect these lands or any of their incidents. *Kernan* vs. *Griffith*, 27 California, 80.

"The plaintiff claimed by title derived from "John D. Winters, to whom the lands were "patented by the State as swamp and overflowed "lands, January 15th, 1856, and who had pur-"chased them under the Act of April 28th, 1855. "This claim the plaintiff sustained, *prima facie*, "at the trial, by the introduction of the patent "and a series of mesne conveyances, terminating "in himself.

"The defendant, having proved that he, on the "20th of February, 1864, duly entered the lands "in question in the office of the Register of the "United States Land Office for the Stockton

" District, under the Homestead Act of 1862,
" gave in evidence the map of the survey by the
" Government of the United States of the town-
" ship embracing the quarter section in contro-
" versy. The survey from which said map was
" prepared was made in December, 1854, and was
" approved by Surveyor-General of the United
" States for the State of California, June 15,
" 1857, sixteen months after the issuing of the
" patent to Winters. It appeared by the map
" that the quarter section in dispute was high
" land, and not swamp and overflowed. The
" Court instructed the jury that the character of
" the lands was established conclusively by the
" Government survey, and under that instruction
" the jury returned a verdict for the defendant.
" The question is upon the correctness of that
" instruction.

" The instruction was erroneous. The title of
" the State to the swamp and overflowed lands
" within its limits was derived from the General
" Government under the Act of September 28,
" 1850. It was held in *Summers* vs. *Dickinson*, 9
" Cal., 554, that upon the passage of the Act of
" Congress referred to, the State became the abso-
" lute owner of all the swamp lands within her
" limits which had not been disposed of, and that
" the title of the State in no way depended upon
" a patent, the Act itself operating as a full and
" perfect conveyance *in præsenti*. The Court
" arrived at the same conclusion in *Owen* vs.
" *Jackson*, 9 Cal., 322; further holding, however,
" that a patent issued to the State under the sec-

" ond section of the Act would have no operation
" except by way of further assurance. These de-
" cisions are not only in harmony with the lan-
" guage of the Act, when properly construed, but
" are fully sustained by the case of *Foley* vs. *Har-*
" *rison*, 15 How., 447; and the case of *Wilcox* vs.
" *Jackson*, 13 Pet., 516. As late as November,
" 1858, Mr. Attorney-General Black, in an official
" communication to the Secretary of the Interior,
" held that it was not necessary that a patent
" should issue in order to vest the 'title under the
" Act of September 28, 1850'; and in repeated
" instances circulars have been issued from the
" Department of the Interior, in which the same
" view of the effect of the grant has been taken.
" In view of these authorities we are not at lib-
" erty to consider the question as an open one.

" If the grant to the State was absolute, cloth-
" ing the State presently with the 'absolute power
" of disposing' of the lands falling within the de-
" scription contained in the grant, as was held in
" the two cases cited from the 9th Cal., it follows
" that neither the United States, the grantor, nor
" the State, the grantee, could by any *ex parte*
" survey, or other proceeding of like character,
" determine or in any manner affect the rights of
" the other. * * * * *

" It is urged, on the part of the respondent,
" that the Act of Congress admitting California
" into the Union, states, as a condition, that the
" people, through their Legislature, or otherwise,
" shall never interfere with the primary disposal
" of the public lands within its limits. The Act

" was passed on the 9th of September, 1850, and
" thereafter, on the 28th of the same month, Con-
" gress, in the full exercise of its admitted powers,
" granted to the State absolutely all the public
" lands therein that were then swamp and over-
" flowed; thereby presently segregating them,
" by clear and apt description, from the mass of
" the public domain, and reducing them to pri-
" vate ownership; and, therefore, a survey of
" those lands thereafter by the Government can-
" not be considered as having any just relations
" to the power reserved to the United States by
" the Act under which California came into the
" Union."

In the recent decision of Judge Sawyer of the U. S. Circuit Court in the Debris Case, there are some pertinent observations as to "mining customs" in California:

Woodruff vs. *North Bloomfield Gravel Mining Co.*, 1 West Coast Reporter, p. 224, 225, 226.

" The next defense is, that the acts of defend-
" ants are authorized by the customs of miners
" which have been recognized, confirmed and
" legalized by the legislation, both of the State
" and of Congress. This legislation will now be
" considered.

" In 1851, the Legislature of California, in the
" Code of Civil Procedure, made the following pro-
" vision: 'In actions respecting 'mining claims,'
" ' proof shall be admitted of the customs, usages,
" ' or regulations established and in force at the

" ' bar or diggings embracing such claim; and
" ' such customs, usages, or regulations, *when not*
" ' *in conflict with the Constitution and laws of*
" ' *this State*, shall govern the decision of the
" ' action '—Stat. 1851, p. 149, Sec. 621. This
" provision has been carried into the last Code of
" Civil Procedure—Sec. 748. The Act of Con-
" gress of 1866 also provided that the mineral
" lands ' of the public domain shall be open to
" ' exploration and occupation, subject also to the
" ' *local* customs or rules of miners in the several
" ' mining districts, so far as the same may not
" ' be in conflict with the laws of the United
" ' States'—14 Stat., 251, Sec. 1. And the Act of
" 1872 further provided, that ' the miners of each
" ' *mining district* may make regulations *not in con-*
" ' *flict with the laws of the United States, or the*
" ' *State*, or Territory in which the district is sit-
" ' uated, governing the *location, manner of re-*
" ' *cording, amount of work necessary to hold pos-*
" ' *session of a mining claim*,' etc., both of which
" provisions have been carried into the Revised
" Statutes, R. S., Secs. 2319, 2324.

" The first observation suggested is, that none
" of these provisions, either State or National,
" have any relation at all to the subject-matter of
" this suit. They simply recognize and legalize
" customs and regulations by which miners'
" rights, as beween themselves, upon the public
" lands may be secured, regulated and protected.
" They relate to ' mining claims' alone—to the
" manner of acquiring and protecting rights in
" them. They refer to the extent of the claim,

" the manner of taking up and holding it, the evi-
" dence of title, etc., as between themselves and as
" against each other, and in the State legislation,
" not as against the Government or owner of the
" land. *Much less does it attempt to give them*
" *rights as against private parties, vested with the*
" *fee of other lands not mining, and not even within*
" *the mining regions.* It has no relation to lands
" owned in fee by private parties. The principle
" acted upon was, to regard the miners as against
" everybody, except the owner of the lands in
" which the mines were found, as the proprietors
" of limited portions of the mines on the public
" lands actually in their possession and occupa-
" tion, and to prescribe rules for the acquisition,
" regulation and protection of such limited rights.
" The principle acted upon is fully stated, with
" reference to other public lands, in *Lamb* vs.
" *Davenport*, 1 Saw., 620; and this statement of
" the principle was approved by the Supreme
" Court of the United States in *Starr* vs. *Stark*,
" 94 U. S., 487, note. 'The provision in no way
" interferes, or attempts to interfere, with the
" rights of the owner of the fee, even in these
" lands, much less in any other lands; nor does
" it authorize, or attempt to authorize, any cus-
" tom, or usage, or regulation which shall en-
" croach upon the rights of others owning agri-
" cultural lands in fee, situate in the valleys many
" miles distant. On the contrary, it is expressly
" provided, that 'such customs, usages or regula-
" tion shall govern' only '*when not in conflict*
" *with the laws of the State.*' A custom or usage

"attempted to be established, whereby mining "debris might be sent down to the valleys, "devastating the lands of private owners, holding "titles in fee from the Mexican Government, as "old as the title of the United States, without "first acquiring the right to do so by purchase or "other lawful means, upon compensation paid, "would be in direct violation both of the laws "and Constitution of the State and of the Con-"stitution of the United States. Instead of be-"ing authorized by the statute, it would be in "direct violation of the statute. It would also be "in direct violation of the express provisions of "the statutes defining nuisances already cited.

"One of the earliest statutes passed by the "first Legislature of California adopted the Com-"mon Law as the rule of decision in this State: "Stat. 1850, p. 219; and that statute has been in "force ever since, except so far as modified by "the Civil Code. *Sic utere tuo ut alienum non "lædas*, is one of the fundamental maxims of the "Common Law, more frequently cited and en-"forced, perhaps, than any other in the law. "And this maxim is still continued in force in "Section 3514 of the Civil Code of California, "where it is translated: 'One must so use his "'own rights as not to infringe upon the rights "'of another.'

"Any custom or usage which would attempt "to authorize the acts complained of, would clearly "violate this fundamental principle of the law."

* * * * * * *

"The customs recognized and validated by
" Congress are only the same '*local*' customs be-
" fore recognized by the State legislation, except
" that the Acts of Congress not only regulate
" these matters among miners as between them-
" selves, but also give them some rights as
" against the United States in the public lands,
" but in no other lands. And the limitation ex-
" pressly put upon these customs and usages is,
" that they shall not be 'in conflict with the laws
" 'of the United States or the State, * * *
" 'within which the district is situated.' Thus
" Congress is also careful not to give any counten-
" ance to the idea that private rights can be en-
" croached upon under the guise of the customs
" or usages of miners intended to be legalized.
" Again: these customs and usages recognized are
" '*local*' customs, limited to the 'bar or diggings'
" within which they are situate. They are not
" *general* customs, and such customs and usages
" as are set up in this particular are not within the
" legislation invoked. Besides, customs, to be
" valid under the common law, must be reason-
" able. Can a custom or usage which would allow
" the whole of the Sacramento and other valleys
" of California to be filled up and devastated, no
" matter how well improved or largely peopled,
" be reasonable? Such a custom would be valid,
" if the custom relied on is valid. It is only a
" matter of degree, not of principle. The Su-
" preme Court of California has never recognized
" the validity of any custom to mine in such a
" manner as to destroy or injure the property of

" others, even in the district or diggings where
" the local customs and usages of miners are sanc-
" tioned by the statutes. But the California re-
" ports are full of cases where the principle has
" been enforced in the mines, that every one must
" so use his own property as not to injure another.

" Said the Supreme Court, in *Hill* vs. *Smith*,
" 27 Cal., 482: 'This notion (that the rules of
" the common law as to water right have been
" modified in California) is without substantial
" foundation. The reasons which constitute the
" groundwork of the common law upon this sub-
" ject remain undisturbed. The conditions to
" which we are to apply them are changed, and
" not the rules themselves. The maxim, *Sic utere*
" *tuo ut alienum non lædas*, upon which they are
" grounded, has lost none of its governing force;
" on the contrary, it remains now, and in the *min-*
" *ing regions* of this State, as operative a test of
" the lawful use of waters as at any time in the
" past, or in any other country.' And in *Richard-*
" *son* vs. *Kier*, 34 Cal., 74, the Court said: 'He is
" bound to so use his ditch as not to injure his
" neighbor's land, irrespective of the question as to
" which has the older right or title, * * * " and
" if, through any fault or neglect of his in not prop-
" erly managing and keeping in repair, the water
" does overflow or break through the banks of the
" ditch and injure the lands of others, *either by*
" *washing away the soil or covering the soil with*
" *sand, the law holds him responsible;*' and these
" are but examples of many others too numerous to
" mention and too familiar in this State to require

" citation. The Supreme Court of the United
" States recognizes the principle of the maxim also
" in *Jennison* vs. *Kirk*. Said the Court: 'The
" position of the testator's ditch prevented this
" working, and thus deprived him of this value of
" the water, and practically destroyed his mining
" claim. No system of law with which we are
" acquainted tolerates the use of one's property in
" this way, so as to destroy the property of an-
" other.'

" We are fully satisfied that the acts of defend-
" ants complained of are not authorized by any
" valid custom or usage, or by any valid law,
" statute, or otherwise, of the State of California,
" or of the United States; and that complainant
" is entitled to such relief as shall fully and amply
" protect him from any further injuries to his
" property, and any further encroachments upon
" his rights."

The United States had no power over the swamp and overflowed lands in California, after its grant of them to said State by the Act of Congress, September 28th, 1850.

All the lands owned by plaintiffs, and described in the amended complaint herein, are swamp and overflowed lands, and as such, were granted by the United States to the State of California, by the Federal Statute of September 28th, 1850.

FINDING 3D.

"That the said lands of plaintiffs are situated in "and form part of the body of swamp and over-"flowed lands designated in these findings, and on "the map hereto annexed as Buena Vista swamp," etc.

Record, Vol 1, p. 88, folio 356.

FINDING 79.

"That the overflows and the seepage, and per-"colation in these findings mentioned, did, prior "to September 28th, 1850, cause said lands "within said swamp to be swamp and overflowed "lands, and said lands had become, and were on "said 28th day of September, 1850, swamp and "overflowed lands, and as such were granted to "the State of California by Act of Congress, ap-"proved, September 28th, 1850."

Record, Vol. 1, p. 116, folios 462, 463.

At no time since the 28th of September, 1850, has the Federal Government had any power over these State lands. It had no power to grant them; no power to give a license as to them; no power to affect the title of them; no power to legislate concerning them; no power to establish customs or usages over them; and no power to deprive them of the streams or watercourses which flowed through them.

While the State owned these lands, and the United States owned the surrounding and contiguous lands, they were adjacent proprietors,

and neither proprietor could do anything to affect or impair the title or value of the lands of the adjoining owner.

The legislation of Congress, therefore, at any time since September 28th, 1850, has no possible effect upon these State lands. Judge Sawyer, in the Debris Case, has so well stated the argument (if any be necessary) upon this branch of our case, that we submit this point with quotations from his decision.

Woodruff vs. *North Bloomfield Gravel Mining Co.*, 1 West Coast Reporter, pp. 198, 199, 200, 201, 203.

" Defendants allege that both Congress and the " Legislature of California have authorized the " use of the navigable waters of the Sacramento " and Feather Rivers for the flow and deposit of " mining debris; and having so authorized their " use, all the acts of defendants complained of are " lawful, and the results of those acts, therefore, " cannot be a nuisance, public or otherwise. It is " not pretended that either Congress or the Leg- " islature of California has anywhere in express " terms provided that the navigable waters of the " State may be so used, but this authority is sought " to be inferred from the legislation of both bodies, " recognizing mining as a proper and lawful em- " ployment; and encouraging this industry, know- " ing that mining of the kind complained of could " only be carried on successfully by discharging " the debris into the streams in the mining regions, " which must, from the necessity of the case, find

" its way into the navigable waters of the State.
" As to Congress, it might be sufficient to say that
" it has no authority whatever to say what shall,
" or what shall not, constitute a nuisance within a
" State, except so far as it affects the public navi-
" gable waters, and interferes with interstate or
" foreign commerce, or obstructs the carrying of
" the mails. Under its authority to regulate com-
" merce between the States and establish post-
" roads, Congress may, doubtless, declare and pun-
" ish as such, the obstruction of the navigable
" waters of the State, as a nuisance to interstate
" and foreign commerce, but there its authority
" ends. The necessary results of the acts com-
" plained of clearly constitute a public and private
" nuisance both at common law, and within the
" express language of the Civil Code of California
" already cited; and there is no limitation
" upon that definition except that contained in
" Section 3482 of the same code, which provides
" that 'nothing which is done or maintained under
" the *express* authority of *a statute* can be deemed
" a nuisance.' That means, of course, a statute,
" and a *valid* statute, of the State. The case in
" hand is not within this limitation, because there
" is no statute of the State *expressly* authorizing
" the defendants to send their debris down, to the
" destruction or injury of the navigable waters of
" the State, or to the destruction or injury of the
" property of the riparian proprietors along the
" line of the water-courses of the State, navigable
" or otherwise; and if there were, the statute

" authorizing such injuries as are complained of, as
" against private parties at least, would be uncon-
" stitutional and void.

" It is only sought to work out this authority
" by implication and inference from statutes recog-
" nizing mining in itself, without reference to in-
" juries to the property of others, as a legitimate
" and proper business. It is not the general prac-
" tice of legislative bodies in this country where
" their powers are limited in legislating upon vari-
" ous subjects within their province to provide
" that in the exercise of rights provided for, no
" injury shall be done to the property of others.
" It is one of the conditions always implied by the
" law that one's rights, whether granted or regu-
" lated by the Legislature, shall be exercised with
" due regard to the rights of others—so exer-
" cised as not to injure another; and certainly no
" authority to encroach upon the vested rights of
" others can be inferred without being in express
" terms clearly authorized; and this principle is
" expressly recognized in the statutory limitation
" on the definition of a nuisance cited. This *ex-*
" *press* provision excludes the idea that the Legis-
" lature contemplated any other limitation than
" such as is authorized in 'express' terms. It is
" as potent in the form expressed as if the statute
" had said, in express terms, that there should be
" no other limitation.

" But no intention can be properly inferred from
" any Act of Congress brought to our notice to
" permit the destruction or injury of the navigable
" waters of the State, or the destruction or injury

" of the towns and cities, or property of the ripa-
" rian and adjacent owners along the water-courses
" of the State, navigable or otherwise. *As to non-*
" *navigable waters, Congress had nothing to do*
" *with them, beyond the rights of the United States*
" *as a riparian proprietor, which are the same as*
" *the rights of other riparian proprietors,* except
" that it might itself limit the rights of purchasers
" from the Government of lands owned by it, sold
" subsequent to the passage of the Act under
" which such limited sales are made. *It had no*
" *power whatever to enlarge the rights of the ven-*
" *dees of the United States as against rights*
" *already vested in prior purchasers. It could in*
" *no way authorize any encroachment by the grant-*
" *ees of the United States upon, or injury to, the*
" *property of other private parties; and it will*
" *not be presumed that it intended any such conse-*
" *quences where it has not manifested its intention*
" *in such express and explicit terms that it cannot*
" *be misunderstood.*

" Upon the cession of California by Mexico, the
" sovereignty and the proprietorship of all the
" lands within its borders, in which no private in-
" terest had vested, passed to the United States.
" Upon the admission of California into the Union,
" upon an equal footing with the original States, the
" sovereignty for all internal municipal purposes,
" and for all purposes except such purposes and
" with such powers as are expressly conferred
" upon the National Government by the Con-
" stitution of the United States, passed to
" the State of California. Thenceforth, the only

" interest of the United States in the pub-
" lic lands was that of a proprietor, like that
" of any other proprietor, except that the State,
" under the express terms upon which it was ad-
" mitted, could pass no laws to interfere with their
" primary disposal, and they were not subject to
" taxation. In all other respects the United States
" stood upon the same footing as private owners
" of land. They could authorize no invasion of
" private property, either to enable their grantees
" to mine the lands purchased by them of the
" Government, or otherwise: *Biddle Boggs* vs.
" *Merced Min. Co.*, 14 Cal., 375, 376; *People* vs.
" *Shearer*, 30 Id., 658; *Pollard's Lessee* vs. *Hagan*,
" 3 How., 223. The observations of Chief Justice
" Field in the first case cited, on pages 375, 376,
" are as applicable to this point as to that under
" discussion in that case.

" As owners of the public lands, the United
" States, like any other owner, could sell them in
" large or small quantities, and convey a fee-sim-
" ple title to their grantees; or could lease them,
" or reserve them from sale; or grant a limited
" estate, subject to easements granted to others;
" or in case of mines, might allow them to be
" worked free of charge, or upon payment of a
" royalty. They could do all this with their own
" lands, held in the character of proprietor,
" merely, as the public lands are held; *but they*
" *could not grant lands, and in the grant, or by*
" *statute or otherwise, impose an easement for the*
" *benefit of their grantees upon lands already owned*
" *in fee by private parties, unincumbered by ease-*

" *ments or conditions of any kind; or authorize*
" *any other trespass upon or injury to such other*
" *lands. They could only deal with their own, as*
" *other land proprietors deal with theirs.*

" Being the owners of the mineral as well as
" the agricultural lands of the State, not already
" become private property by prior grants, all the
" legislation of Congress upon the subject has had
" reference to all those lands as their property in
" the character of property, and to their sale or
" other disposition. The agricultural lands the
" United States had theretofore sold absolutely,
" conveying a fee-simple title, without easements,
" incumbrances, or reservations of any kind.
" Had it been the policy of the United States to
" sell these mineral lands in a similar mode, ac-
" cording to the usual surveys and legal subdi-
" visions in the case of other public lands, I ap-
" prehend that no one would have contended that
" by authorizing the sale and conveyance of such
" lands in fee-simple, *the Government* intended to
" give to its grantees authority to fill up the navi-
" gable waters of the State or its non-navigable
" water channels, and when these were filled, to
" send their debris over the neighboring country,
" to the destruction of the farms and improve-
" ments of their owners, on the ground that Con-
" gress knew, when it authorized the sale, that the
" grantees of the United States could not make
" the lands so purchased available for *all* the uses
" for which they were valuable, and in many in-
" stances for which they are *only valuable*—such
" as mining for gold—without committing such

" nuisances. Yet, when the United States con-
" vey their lands in fee-simple, they invest their
" grantees with all the rights they are capable of
" conferring. Now, the legislation of Congress,
" instead of enlarging or attempting to enlarge
" the rights of the grantees of the United States
" in the mineral lands beyond the rights which
" the government possesses, has put limitations,
" restrictions, and incumbrances upon these grants,
" in many instances granting to one party one es-
" tate, and to another a separate estate, in the
" same lands, all the estates granted to the several
" grantees of different interests in the same lands,
" in the aggregate, making up the fee and no
" more; and it is to this end, and to this end
" alone, that the legislation of Congress has been
" directed with reference to the mineral lands.
" Undoubtedly, it was the purpose of these re-
" strictions upon grants of the mineral lands to
" encourage mining, which in itself, when pursued
" without injury to others, is a lawful pursuit, as
" are agriculture, manufactures and commerce.

" Until 1866, there had been no legislation by
" Congress in regard to lands containing the
" precious metals, other than to reserve them
" from sale. In July of that year Congress
" passed the 'Act granting the right of way to
" 'ditch and canal owners over the *public lands*,
" 'and for other purposes.' That Act declared
' that the mineral lands are 'to be and are open,
" 'to exploration and occupation by all citizens of
" 'the United States, * * subject to such regu-
" 'lations, as may be prescribed by law, and subject,

" ' also, to the local customs, or rules of miners in the
" ' several mining districts, so far as the same may
" ' not be in conflict with the laws of the United
" ' States.' It also provided for a sale and patent-
" ing to miners of *quartz* lodes in limited quanti-
" ties, with a right to follow the vein down on its
" dip to any depth, although it should extend un-
" der other lands, without the boundaries of the
" surface lines of the patent. So, also, it recog-
" nized the equities, as against the United States
" and other miners, of those who had acquired
" water rights for mining, agricultural, manufactur-
" ing, and other purposes recognized by the 'local
" ' customs and decisions of Courts,' and provided
" that they should be maintained in these rights,
" and granting a right of way over the *public*
" lands; but it took care to provide, that where
" any party, after the passage of the Act, should
" ' injure or damage the *possession* of any settler
" ' on the *public domain* (no matter for what pur-
" ' pose he has settled), the party committing such
" ' injury or damage shall be liable to the party
" ' injured for such injury or damage:' 14 Stat.,
" 251–3. This Act but legalized what were be-
" fore trespasses upon the public lands, and made
" lawful, as between the occupants and the United
" States, that which before was unlawful. It only
" provided for the sale of quartz mines and grant-
" ing water rights on the public lands, although
" all kinds of mines were open to exploration and
" working.

" In this case, the United States were absolute
" owners of the lands, and they might have grant-

" ed an absolute right of way for ditches and ca-
" nals, without providing for compensation for in-
" juries to occupants; but so careful was Congress
" not to injure others, even where it lawfully might,
" that it provided that a party constructing a ditch
" or canal should be liable for any injury or dam-
" age done to any *mere possessor of the public lands.*
" If Congress was so careful to provide against au-
" thorizing any injury to the mere possessors of the
" public lands, where it might lawfully do other-
" wise, it cannot be reasonably supposed or in-
" ferred that it intended by the same act to author-
" ize by inference merely, the commission of a
" great and intolerable nuisance, and the perpetra-
" tion of aggravated injuries to large communities
" holding their own lands independent of the
" United States, and by the same title, and under
" the same treaty as those under which the Gov-
" ernment itself claimed—injuries to the lands
" over which the United States had no municipal
" or proprietary or legislative authority whatever.
* * * " Had all these lands on the water-
" shed of the Yuba, or all lands in the State con-
" taining mines, been owned under a Spanish
" grant by a private party, as was the Merced
" grant, confirmed to Fremont, the owner of the
" lands might have made precisely such regula-
" tions as to the sale or working of the mines, and
" giving water rights and other easements in his
" lands as the United States have done by their
" legislation, and with precisely the same effect.
" Had such been the case, would counsel for a
" moment have pretended that by such regulations

" he intended to subordinate the navigable waters
" of the State, and the rights of all property hold-
" ers on the waters of the State below, to the uses
" of his grantees of mines? Yet the inference
" that he did so intend, would be just as legitimate
" as the inference that Congress so intended by
" the legislation relied on; and if he so intended,
" he had just as much power to give effect to his
" intention as had Congress."

Alleged duty of reclamation by the swamp land grantee.

It has been argued by respondent, that this being swamp land, it was granted to the State of California for the express purpose of being reclaimed; that plaintiffs were bound to remove the waters of Buena Vista Slough from the swamp district, and being so bound, they could have no property in Buena Vista Slough, even though it were a watercourse. That position was put by the counsel for respondent, in the Court below, in this form: "Could the force of absurdity go fur-
" ther? They charge defendant with a nuisance
" for removing the very water which the grant
" cast upon the plaintiffs the duty of removing?"
And another counsel for respondent, in the Court below, argued, that the State, in granting these lands to plaintiffs as swamp and overflowed lands, substantially said to them: "You shall have these swamp lands, but without any riparian rights."

The only authority cited by the defendant upon that point was the case of *Kimball* vs. *Reclamation Fund Commissioners*, 45th California; and that case is again cited here by respondent. (See respondent's brief, p. 87.)

The Act of Congress, granting swamp and overflowed lands, says:

"That to enable the State of Arkansas to con-
" struct the necessary levees and drains to reclaim
" the swamp and overflowed lands therein, the whole
" of those swamp and overflowed lands, made unfit
" thereby for cultivation, which shall remain unsold
" at the passage of this Act, shall be and the
" same are hereby granted to said State." * * *
" That the proceeds of said lands, whether from
" sale or direct appropriation in kind, shall be ap-
" plied, exclusively, as far as necessary, to the
" purpose of reclaiming said lands by means of
" levees and drains aforesaid." * * * "That
" the provisions of this Act be extended to, and
" their benefits conferred upon, each of the other
" States of the Union, in which such swamp and
" overflowed lands may be situated."

(1 Lester's Land Laws, 169, 170.)

Undoubtedly, that grant was with the idea, and for the purpose of having these lands reclaimed. There was no condition, however, to the grant, either precedent or subsequent; but that was the general equity of the statute. The case of *Kimball* vs. *Reclamation Fund Commissioners*, 45 Cal., 357, simply decides that the Legislature may

create a system of reclamation, and that the swamp land grantee is subject to his proportionate share of assessment under such system.

What was the object of the Act of Congress in granting these swamp lands to the State? The object was to render them fit for cultivation. If a valuable watercourse runs through such lands, it is not at all essential to their reclamation that that watercourse should be drained or filled up; for if that watercourse is destroyed, the whole object of the statute is defeated. The object is to render swamp lands fit for cultivation. That involves the idea of removing the surface water, and so far draining the lands, in the language of the statute, "by means of levees and drains," as to place them in a condition to be planted, to put them in a condition to raise crops. But if there is a valuable affluent flowing through them, the reclamation of these lands does not involve the destruction of this vitalizing stream. These lands will not be made fit for cultivation, if you drain off the surface water, and at the same time drain off and destroy this Buena Vista Slough. We are told by all the witnesses who testified on the subject, without contradiction, that if the waters of that slough are taken away from this swamp district, it will become perfectly valueless for the purposes of stock, and have no prospective agricultural value.

It seems to us directly contrary to the whole meaning and spirit of the Act of Congress, that under the idea of reclaiming swamp land, you are to disvalue and destroy it; that you are not only

to drain it of any surface water, which renders it unfit for cultivation, but that you must also deprive it of a stream which gives to the land all its vitality and value. You can reclaim this swamp land district without affecting Buena Vista Slough in any way, shape, or manner. There is no testimony here showing, or even suggesting, that this stream cannot continue to flow in its natural channel, and yet the balance of this swamp district be completely reclaimed. There is no more inconsistency in that stream flowing through that swamp land district, and the balance of the land being drained so as to be susceptible of cultivation, than in the case of any ordinary tract of upland.

This swamp district is not a quagmire.

We have shown by abundant testimony, that when the spring freshet recedes, nearly all of this swamp district is traversable both by man and beast.

W. W. Hudson Testifies.

"Q. When were you first on Buena Vista Slough "that you speak of, running out of Buena Vista Lake?

"A. I think I was there, sir, in 1859, and perhaps in "1860 or 1861. I know I was there in 1861. I can't "remember when I was there last, in 1872 or 1873." *(Record, p. 47, folios 184, 185.)*

"I drove a great deal of stock through there from "1862 till 1872 or '3. I think I made my last trips, per-"haps, in 1872. In driving stock, you drive it on the "west side of Buena Vista Lake, and thence on the west "side of Buena Vista Slough to Tulare Lake, and on "the west side of Tulare Lake to what is known as Fish "Slough, or the outlet of Tulare Lake; thence down "the San Joaquin to Pacheco Pass, and by Gilroy to "San Jose.

" Q. Then, in driving from Buena Vista Lake to Tu-
" lare Lake, you would follow that slough ?
" A. Yes, we followed the slough in order to get
" water and camp. In following that slough we found
" water all the way down through, always." (*Record, p. 47, folios 185, 186.*)

" I drove a great deal of stock ; sometimes once and
" sometimes as often as *three times a year*, from 1862 to
" 1872.
" Q. You drove along Buena Vista Slough, from
" Buena Vista Lake down to Tulare Lake.
" A. To Tulare Lake." (*Record, p. 48, folio 188.*

James C. Crocker Testifies.

" Q. When did you first become acquainted with the
" lands through which Buena Vista Slough runs ?
" A. I first saw them in 1854. I then came up here
" with a band of cattle from Los Angeles.
" Q. Where did you first strike the lands of Buena
" Vista Slough at that time ?
" A. I struck the slough near the point of hills which
" make into Buena Vista Slough ; not exactly at the
" point, but north of the point. That was north of Buena
" Vista Lake." (*Record, p. 118, folios 470, 471.*)

" Q. What was the condition of the slough at that
" time that you first saw it ?
" A. Well, it was a wide slough, deep and a plenty of
" water in it. It was running a strong current ; not a
" rapid current, but a strong, deep current. It was running
" from Buena Vista Lake north. That was the only
" time I saw Buena Vista Slough that year at that point.
" The next morning we struck it perhaps half a mile or
" a mile further north, when we crossed back with the
" cattle. The condition of the slough there was about
" the same as where we first struck it. That was in Au-
" gust. We then kept right on traveling down the
" slough from that clear to Tulare Lake. We followed
" right along the edge of the slough, at night, on account
" of the mosquitoes, back as far as we could get conve-
" niently, and camped." (*Record, pp. 118, 119, folios 471, 472.*)

"I could not tell how many camps we made going "down the slough, but I think we camped three or four "days on the slough. We lost our horses. I think al- "together we must have camped eight or ten nights.

"Q. What was the condition of the slough all of the "way down?

"A. It was full of water.

"Q. You say you camped eight or ten nights; would "that be at eight or ten different points?

"A. Except three nights. We camped three nights "at one place." (*Record, page 119, folio 474.*)

"I next visited the slough in 1855. I went there with "a drove of horses. I struck the slough a little south of "the point where I struck it with the cattle, or near "where the slough leaves Buena Vista Lake. I think "that was, as near as I can recollect, in September, or "perhaps October. The slough was about the same at "that point as when I first saw it. At that time I did "not cross it at that place. After striking it, we fol- "lowed it down the same as before, and camped. We "followed it to Tulare Lake on the northwest side. We "camped in the vicinity of the slough some five or six "nights. At that time we did not cross the slough. We "went into it to water our horses. We had no cattle." (*Record, p. 120, folios 477, 478.*)

"I crossed it right at the old Baker Dam, where the "Baker Dam was put in. We made a crossing by ex- "tending a rope across the slough and building a tule "float, and then taking hold of a rope and pulling the "float back and forth across the slough. We went over "there and followed the slough to a point six miles "south of Tulare Lake on about Sec. 1." (*Record, p. 121, folios 481, 482.*)

"Q. What were you doing on the slough with your "cattle from 1872 to 1876?

"A. We were raising cattle—working with cattle all "of the time. When I first went there, we estimated to "have about 1200 head of cattle. That was in 1869. I "could not tell how many I had in 1876. I had bought "a great many, and raised a great many. I could not "make an estimate. We might have had 10,000, or

" might have had 15,000; I could not tell. I think we " had at least 10,000 cattle." (*Record, p. 124, folios 492, 493.*)

" Q. In working in that swamp, as you style it, Mr. " Crocker, with your cattle, from the year 1869 to the " year 1876, were you all through that swamp and cross- " ing the channels?

" A. Yes, sir; *I think I have been on every acre in " that swamp from one end of it to the other*, at different " stages of water. At high water, of course, I was not in " so frequently." (*Record, p. 124, folio 494.*)

R. B. Still testifies:

" Q. When did you first visit that slough?

" A. In 1874. I was there working with cattle for " Cox and Clarke. When I first went to it, I struck the " slough at a point about opposite the Tule House; " about opposite the Tule House. That Tule House is " about ten miles south from where Lake Tulare is now. " After striking the slough, we worked along south up " Buena Vista Slough. We were on the west side. We " worked up to where the bridge is now, and crossed " there. I refer to the only bridge on the slough; it is " near the point of hills, and, I should think, about eight " miles to Buena Vista Lake." (*Record, p. 190, folios 757, 758.*)

" Q. What was the condition of the water running " through Buena Vista Slough at that time?

" A. It appeared to be full of water. I was about a " month in making each of those trips. We camped " along from night to night on the slough. I was next " there in April, 1875. We were branding calves. It " was in April. We struck the slough at that time in " the same place on the west side, where it runs into " Tulare Lake. We worked along up on the west side " of the slough, up to the same crossing. I don't know " how long we were going up there; but about eight " days, stopping nights along the slough. We crossed " the slough again at the same place where we crossed it " the year before. After crossing it, we ran along the

" foot-hills and came up here to Bakersfield. I was " along that slough during 1875 almost all of the time " until August, working and camping along in various " places between Buena Vista and Tulare Lakes. We " were going the whole distance between the lakes. " That season we crossed the slough at different points ; " crossed it several times. It was full of water.

" Q. In crossing, how would you make a crossing ?

" A. We would swim it. I think *I remained there " with the stock six months.* During all of that time I was " along the slough with cattle. *I went there again " on the 1st of February, 1877, and with cattle again, and " I remained there until about the 16th of January, 1878.*" *(Record, p. 191, folios 761, 762, 763.)*

F. A. Tracy, who lived in, and on the edge of, the swamp district from 1863 to 1878, testifies :

" I had my stock on the swamp land there. I think " the latter part of 1863 was the dry season, and the " feed was scarce. I went once there for the purpose of " getting feed. In 1864 the water came down in April, " perhaps. After reaching my camp on the east side of " Buena Vista Slough in 1864, I remained there until " 1867, and then moved camp again. *I remained there " three years. That was my headquarters there during " those three years.* I was taking care of stock cattle " there." *(Record, page 231, folio 923.)*

" Q. Where did you run them ; where were they run- " ning ?

" A. Running along the borders of that Buena Vista " Slough, and back in the plains. My cattle ranged " down as far as Tulare Lake, and I went down as far as " that, in connection with my stock." *(Record. p. 232, folios 924, 925.)*

" In 1867 and '68 I was ranging my stock on Buena " Vista Slough, and also had some of them on the Goose " Lake side. I was ranging on both sides. I was going " all of the distance along Buena Vista Slough, between " Buena Vista and Tulare Lakes. I was crossing to " and fro in 1867 and 1868 ; and during 1869 I was " along on Buena Vista Slough with my stock. I had

" stock along on both sides of that slough, though I in-
" tended to keep them on the east side. That year I
" was crossing to and fro all of the while." *(Record,*
" *page 233, folios 929, 930.)*

J. M. Lewis Testifies.

" Q. When did you first come to or visit what is
" known as Buena Vista Slough, running between Buena
" Vista and Tulare Lakes.

" A. I think I crossed it in 1862, driving stock and
" horses. I struck it at what is called the Tule House."
(*Record, p. 260, folio 1038.*)

" We did not go to the slough again until the next
" year, 1863. It was in the spring sometime that I went.
" We struck a slough then at what we always called the
" Staten Slough. That is on the west side of the slough.
" I suppose it was about ten miles south at that time
" from Tulare Lake; maybe twelve miles. I was there
" at a rodeo, gathering cattle. I presume we remained
" there perhaps one day and a night. Then we worked
" down the slough again towards Tulare Lake." (*Rec-*
" *ord, p. 261, folios 1040, 1041.*)

" I came back to the slough next I think in 1866. I
" was not there from 1863 to 1866. I came back in
" 1866 there to help some parties gather cattle and brand
" calves and such like. We struck the slough down at
" the west corner of Tulare Lake. We were on the
" west side of the slough, right at the edge of the lake.
" From there we worked up to Buena Vista Slough, up
" to Tracey's Crossing. *I suppose we were ten or twelve*
" *days going up there.*" (*Record, p. 261, folios 1041,*
1042.)

" I don't think I was on the slough again until 1871.
" I think I went there in April. We struck the slough
" at that time at what is called Crocker's Corral, at the
" head of Staten Slough, and I believe it was at that
" time called the Staten Corral. I think it was about
" twelve or fifteen miles from Tulare Lake, on the south-
" west side of Buena Vista Slough. From there we went

" up the slough some ten or twelve miles. I was gather-
" ing cattle along there. I was there perhaps a week or
" ten days. After gathering cattle I went back to San
" Luis Obispo County. (*Record. p. 262, folio 1044.*)

" I don't think I was on Buena Vista Slough again
" until 1876. I was there in the spring of 1876. I
" struck the slough on the southeast corner of Tulare
" Lake; remained there one night, and then went along
" up the slough—went up some fifteen miles, I suppose,
" maybe twenty. I don't think I went up over twenty
" miles from the lake; not to exceed twenty-five miles;
" and then went to the Sacramento ranch over in San
" Luis Obispo County." (*Record, p. 262, folio 1045.*)

C. W. Clarke Testifies.

" Q. When were you first on what is known as
" Buena Vista Slough?

" A. Along in June, 1865, I think; it might have
" been in May. I was there gathering up cattle. I had
" cattle along Buena Vista Slough at that point. I had
" had cattle on Buena Vista Slough prior to that time.
" *At that time I remained on the slough very nearly a*
" *month from the time I went on to it until I went off*
" *again.*" (*Record, p. 287, folio 1146.*)

" I was the next there in 1866; down on the west side
" of the lake, on this slough. That was in the spring.
" *I was there fifteen or twenty days at a time.* I would
" go in and make a trip and then go back." (*Record. p. 288, folio 1149.*)

" We had our corrals down there, and we had our
" work mostly on the west side, gathering up cattle
" mostly in here. We had our corral on the west side of
" the lake in Township 29 South, Range 19 East. The
" Tule House is on Sec. 32, in Township 25, Range 22
" East. The Tule House is on the slough, on the east
" side of it." (*Record, p. 288, folio, 1150.*)

"Q. When the spring freshets of the river come on "this tract of land in an ordinary season, and the water "recedes to the channel of Buena Vista Slough, what "proportion of the land can be traveled over by man or "beast? What proportion of this swamp land around "the lake and Buena Vista Slough?

"A. I should judge, *ordinarily, all of it; three-"quarters of it.* (*Record, p. 295, folios 1178 1179.*)

Jesse Dover Testifies.

"*I live on the swamp on Buena Vista Slough.* I can-"not locate it on the map, but I guess you all know "where Dover's Hog Camp is without my showing it to "you on the map. It is about fifteen or sixteeen miles "from Wible's Camp, and about on Sec. 1, T. 29, R. 22, "(indicating place on map). I went there in 1876. I "think it was in July. I went there to raise hogs, and "*I am there when I am at home.* I have been in the "hog business ever since. I ran my hogs around over "the country there on Buena Vista Slough, between the "Adobe Holes and Weed Island. I have been there "with my hogs ever since." (*Record, p. 316, folios 1261, 1262*).

F. M. Epperly Testifies.

"*I reside down here on Buena Vista Slough.* I came "on to the slough in 1871. If I remember right, it was "in May, 1871. I then came to a point about fifteen "miles below Mr. Wible's headquarters, Canal Camp, "known as the "Dover Camp" at the present time. It "goes by, and always went by, the name of Dover's Hog "Camp." (*Record, p. 543, folios 2170, 2171*).

"I was working along there on that swamp-land, be-"tween these two points, and working over about nine "miles, all of it. When I left there in 1876, I went to "Gilroy. I returned in 1877 back on to this swamp. I "came there in August—the first days of August. I "came there and went to work with Mr. Crocker, tend-"ing stock-pumps. My camp was on the slough about

" three miles above the Dover place at a pump there is " there. *I remained there about four months* helping put- " ting in pumps and furnishing feed to the pump-camps." (*Record, p. 545, folio 2176.*)

" Q. What time did you leave there?
" A. I left some time about the last of November. I " was not there after that. Then I came back there " again in 1879. I don't recollect exactly what month, " but it was late in the Fall. I located then down on " the swamp near the Tule House. It was six miles " from my camp to the Tule House." (*Record, p. 546, folio 2180.*)

" The corral remains there yet, but the house is moved " away. I was raising hogs there. I remained there " until the last days of April, 1880." (*Record, p. 546, folio 2181.*)

" Q. When the water recedes, and is confined to the " channel, after the spring freshets are over, what portion " of the swamp-land, along the slough there, can be trav- " eled over by man and beast?
" A. I think *about four-fifths of it can be traveled* " *over.*" (*Record, p. 557, folio 2225.*)

" A. My hogs ranged in there *when I lived there five* " *years* at Dover's, from the end of Weed Island to " about three miles down below Dover's." (*Record, p. 568, folio 2269.*)

People, cattle, horses and sheep were continually travelling through this swamp district; thousands of cattle were constantly grazing there, especially in the summer and fall. The Crocker corral, the Staten corral, the Cox and Clarke corral, were all in this swamp. Dover and other hog dealers had their houses there, and lived there. All these facts attest, that this swamp dis-

trict was something more and something better than an ordinary swamp. It was fit for the abode of man; suitable for the support and pasturage of cattle; susceptible of being travelled over by man and beast throughout its entire length of fifty miles. And we submit that it is a very extravagant idea, that we can only reclaim this swamp by destroying this stream, this Buena Vista Slough, which really constitutes the whole value of the district, and without which it would become and remain worthless, for any and every purpose. The swamp and overflowed lands granted by the Act of Congress, of September 28th, 1850, are subject to the disposal of the States wherein they respectively lie. The proviso to the second section of last-mentioned statute, that the proceeds of the lands shall be applied exclusively, as far as necessary, to the purpose of reclaiming the same by levees and drains, imposes no trust, and the title to said lands derived from the State is not affected by the manner in which such State performed that obligation.

See *Mills County* vs. *Railroad Companies*, 107 U. S. (17th Otto), p. 566 (decided at the October term, 1882). Justice Bradley, in delivering the opinion of the Court, says:

"Upon further consideration of the whole sub-
"ject, we are convinced that the suggestion
"then made, that the application of the proceeds
"of these lands to the purposes of the grant
"rests upon the good faith of the State, and that

" the State may exercise its discretion as to the
" disposal of them, is the only correct view. It is
" a matter between two sovereign powers, and
" one which private parties cannot bring into dis-
" cussion. Swamp and overflowed lands are of
" little value to the government of the United
" States, whose principal interest in them is to
" dispose of them for purposes of revenue; whereas
" the State governments, being concerned in their
" settlement and improvement, in the opening up
" of roads, and other public works through them, in
" the promotion of the public health by systems of
" drainage and embankment, are far more deeply in-
" terested in having the disposal and management
" of them. For these reasons, it was a wise measure
" on the part of Congress to cede these lands to the
" States in which they lay, subject to the disposal
" of their respective Legislatures; and, although
" it is specially provided that the proceeds of such
" lands shall be applied 'as far as necessary'
" to their reclamation by means of levees and
" drains, this is a duty which was imposed upon
" and assumed by the States alone, when they
" accepted the grant; and, whether faithfully per-
" formed or not, is a question between the United
" States and the States, and is neither a trust fol-
" lowing the lands nor a duty which private par-
" ties can enforce as against the State."

Decisions of the Supreme Court of California as to Riparian Rights, and as to Water Rights by Appropriation.

An examination of the decisions of the Supreme Court of California shows, that while they recognize and sanction the doctrine of prior appropriation of water, they only do so between appropriators; and in so doing, they declare that they do not intend to prejudice or nullify the rights of riparian proprietors.

Irwin vs. *Phillips*, 5 Cal., 145.

" It is insisted by the appellants that in this " case the common law doctrine must be invoked, " which prescribes that a water-course must be " allowed to flow in its natural channel. But upon " an examination of the authorities which support " that doctrine, it will be found to rest upon the " fact of the individual rights of landed proprie- " tors upon the stream, the principle being both " at the Civil and Common Law, that the owner " of lands on the banks of a water course owns " to the middle of the stream, and has the right " in virtue of his proprietorship to the use of the " water in its pure and natural condition. In " this case the lands are the property either of " the State or of the United States, and it is not " necessary to decide to which they belong for the " purposes of this case."

Kelly vs. *Natoma Water Co.*, 6 Cal., 108:

" Possession, or actual appropriation, must be " the test of priority in all claims to the use of

" water, whenever such claims are not dependent
" upon the ownership of the land through which
" the water flows."

Crandall vs. *Woods*, 8 Cal., 141 :

" The rule is well settled that water flows in its
" natural channels, and should be permitted thus
" to flow, so that all through whose lands it passes
" may enjoy the privilege of using it. A riparian
" proprietor, while he has the undoubted right to
" use the water flowing over his land, must so
" use it as to do the least possible harm to other
" riparian proprietors.

" The uses to which water may be appropriated
" are : 1st—To supply natural wants, such as to
" quench thirst, to water cattle, for household or
" culinary purposes, and, in some countries, for
" the purposes of irrigation. These must be
" first supplied, before the water can be applied
" to the satisfaction of artificial wants, such as
" mills, manufactories, and the like, which are not
" indispensable to man's existence. *Water is re-*
" *garded as an incident to the soil*, the use of which
" passes with the ownership thereof. As a
" general rule, a property in water cannot be ac-
" quired by appropriation, but only by grant or
" prescription.

" Having thus stated the fundamental princi-
" ples upon which this right is founded, it is
" evident that the only difficulty in this case
" arises, first, from the fact that the defendant is
" not the ownerin fee of the land, but that the title
" to it is in the Government of the United States."

Tuolumne Water Co. vs. *Chapman et al.*, 8 Cal., 392 :

" A complaint alleging that plaintiffs had, for a " long time conveyed water from a stream for min- " ing purposes, by means of a ditch, and had thus " acquired a prior right to the enjoyment and use " of the water, and were in the peaceable posses- " sion thereof, when defendants wrongfully diverted " the same, and deprived plaintiffs thereof, and " were continuing so to do, is sufficient to main- " tain a prayer for an injunction."

Ferrea vs. *Knipe*, 28 Cal., 341.

" In 1863, as appears by the finding, the de- " fendant erected a dam across the creek above " the plaintiff's dam, by which the natural flow of " the stream was obstructed. (p. 343.)

" But while admitting that a riparian owner, to " whom the water first comes in its flow, has the " right to use it for domestic purposes, and for " watering his cattle it is proper to observe that he " has not the right to so obstruct the stream as to " prevent the running of water substantially as in " a state of nature it was accustomed to run. The " maxim of the law, which he is bound to respect " while availing himself of his right, is *sic utere* " *tuo ut alienum non lædas*, (3 Kent, 440.)

"Angel on Watercourse, Section 195. *Ty-* " *ler* vs. *Wilkinson*, 4 Mason, 440. " (P. 344.)

" From the facts found, the plaintiff was entitled " to judgment, on the ground that he had the

" right to the water of the creek in the natural
" flow, subject only to the use thereof by the de-
" fendant in a reasonable manner, without unne-
" cessary obstruction or diminution." (p. 345.)

In the case of *Dana* vs. *Jackson Street Wharf Co.*, 31 Cal., 119, the Court recognized the doctrine of riparian rights, but held that the party owning land on the water front of San Francisco was not a riparian proprietor.

Creighton vs. *Evans*, 53 Cal., 56.

" It is admitted by the pleadings that the water
" of Elk Bayou flowed in its natural channel
" through the plaintiff's land, and that the de-
" fendant devoted a portion of the water to his
" own land for purposes of irrigation and other
" purposes. It is not averred that he is a ripa-
" rian owner, and as such entitled to use any por-
" of the water. There is nothing in the record
" to indicate that the defendant was entitled to
" divert any portion of the water, and the Court
" properly iustructed the jury *that the plaintiff*
" *was entitled to recover at least nominal damages,*
" *even though he had suffered no actual damage.*
" But, at the request of the defendant, the Court
" also instructed the jury, that if the defendant
" diverted a portion of the water for a useful pur-
" pose—such as, for example, for domestic use—
" and that enough water was left in the stream
" for the use of the plaintiff for watering his
" stock, and for domestic purposes, and if the
" plaintiff was not damaged by the diversion, the

" verdict should be for the defendants. This
" was not only contradictory to the first instruc-
" tion, but is erroneous in matter of law. So far
" as appears from the record before us, the de-
" fendants were not entitled to divert the water
" for any purpose, and the plaintiff was entitled to
" at least nominal damages."

The last case was followed by the case of *Los Angeles* vs. *Baldwin*, 53 Cal. 469, which recognizes the doctrine of riparian rights.

Pope vs. *Kinman*, 54 Cal., 4, 5.

" 1. The patent to the Muscupiabe Ranch was
" issued in 1872, in the month of June, and this
" action was commenced in May, 1877, and the
" Statute of Limitations can therefore have no
" application.

" 2. For the same reason the defendants can
" claim nothing as against the owners of the
" Muscupiabe Ranch, by reason of the lapse of
" time since their alleged appropriation of the
" waters of Lytle Creek.

" 3. No controversy is made in this action as
" to the rights of those defendants who are ripa-
" rian proprietors of the stream by reason of their
" ownership of the San Bernardino Ranch. The
" principal question presented is, as to whether it
" is competent to the defendants, by the mere di-
" version of the waters of Lytle Creek, which is
" an unnavigable natural stream, flowing across
" the Muscupiabe Ranch, (the land of plaintiffs),
" to deprive the plaintiffs of all interest or right

" of any nature in the waters of that creek. As
" being owners of the land, the plaintiffs have an
" interest in the living stream of water, flowing
" over the land; their interest is that called the
" riparian right. It is not necessary in this case
" to define in detail the precise extent of the ri-
" parian right as existing in this country; it is
" enough to say that under settled principles, both
" of Civil and Common law, the riparian proprie-
" tor has a usufruct in the stream as it passes
" over his land. The judgment of the Court
" below deprived the plaintiffs of this usufruct,
" and declares in terms 'that plaintiffs have no
" 'right, title, or interest in said waters, or any
" 'portion thereof.'

" The judgment of the Court below is there-
" fore modified so as to read as follows:

" *First*—That the defendants have nothing as
" against plaintiffs, except only such rights as
" any of them may have of like character with
" that of plaintiffs as being riparian proprietors
" of land bordering on said stream.

" *Second.*—That none of the defendants have
" any right, title, or interest in plaintiffs said
" premises described in the complaint, and they
" are precluded from setting up any right, title or
" interest in said premises, and particularly from
" any claims therein to the use of ditches upon
" plaintiffs said premises, or to the waters of said
" Lytle Creek, except as riparian proprietors as
" aforesaid."

Zimmler vs. *The San Luis Water Co.*
57 Cal. 221, 222.

" This action is brought to obtain an injunction
" to restrain the defendant from diverting the wa-
" ters of a stream known as the Arroyo de San
" Luis Obispo from its natural course through
" lands belonging to the plaintiff. The Court
" granted an injunction as prayed, and the defend-
" ant moved for a new trial, which was denied,
" and from that order and the judgment this appeal
" is taken. It appears by the record that the plain-
" tiff's intestate was the owner of a tract of land
" which required irrigation, and that some of the
" waters of the above-named creek which flowed
" through the premises were used for that pur-
" pose. In April, 1877, less than two months be-
" fore the commencement of this action, the de-
" fendant diverted the waters of said creek from
" said premises, and deprived the plaintiff of the
" water which she had been using, and which was
" necessary for the irrigation of said land. As an
" administrator of a riparian owner, the plaintiff is
" entitled to the relief prayed and granted, unless
" the defendant had accquired a paramount right
" to all the waters of said creek. And it claims
" that by virtue of a deed executed by plaintiff's
" intestate on the 17th of July, 1877, it acquired
" that right."

The Court then negatived the permission from plaintiff alleged by the defendant—affirmed the

judgment of the Court below, which was in favor of plaintiff, and fully recognized the doctrine of riparian rights.

St. Helena Water Co. vs. *Forbes*, 62 California R., 183, 184.

"It is sufficiently obvious, we think, that the "property in question comes within the category "of real property. 'The rights of riparian pro- "'prietors,' says Mr. Washburn, in his work on "Easements and Servitudes, pp. 276–7 (215), "'though coming under the head of what are "'called "Natural Easements," are not, in fact, "'the result of any supposed grant, evidenced by "'long acquiescence on the part of a superior pro- "'prietor, of the flow of the water from his land "'to the land below. The right of enjoying this "'flow, without disturbance or interruption by "'any other proprietor, is one *jure naturae*, and "'is an incident of property in the land, not an "'appurtenance to it, like the right he has to en- "'joy the soil itself, in its natural state, unaffected "'by the tortious acts of a neighboring land "'owner.'

"'It is inseparably annexed to the soil, and "'passes with it, not as an easement, nor as an "'appurtenance, but as parcel,' said Chief Justice "Shaw, in *Johnson* vs. *Jordan*, 2 Metc., 234. "See also, Angell on Watercourses, Sec. 141; "*Brace* vs. *Yale*, 10 Allen, 443; Civil Code, Sec- "tions 14, 658, 662.

"*The water, therefore, that runs over the defend- "ant's land, is a part and parcel of his land.*"

Blanchard vs. *Bradley*, No. 5,809, Supreme Court of Cal.

This case was decided February, 1878, but was not published in the printed Reports. The decision in the Court below was by the late Judge Fawcett, of the First Judicial District of California. His opinion will be found in the printed transcript of the case—No. 5809, pp. 10, 11 and 12.

"But, in reply to this doctrine, defendant "argues, that by the Act of Congress of July 26, "1866 (2 Bright Dig., p. 404, Chap. 21, Sec. 105; "U. S. Revised Statutes, Secs. 2339–40), his "right to appropriate water on the public lands is "recognized and protected; that, since the "United States was the legal holder of the title "to the lands now claimed by plaintiffs, at the "time of the appropriation of the water by de-"fendant and down to April, 1872, the patent "vested the title in plaintiffs subject to this right, "carved out of, or reserved from the estate.

"The Act in question embraces only *public* "*lands* of the United States. It does not follow "that all the lands to which the United States "holds the legal title are *public lands*. The Gov-"ernment may hold as trustee as well as an in-"dividual. Lands embraced within a confirmed "Mexican grant are not public lands—they are "not part of the public domain. The whole "equitable estate is vested in the confirmee and "his successors, and the Government holds the "naked legal title only, and in trust until the "patent issues. Plaintiffs' lands are of this class,

" and it would not be competent for Congress, or
" any other power, to grant away, diminish or de-
" stroy their estate. Nor does the Act purport
" to do so. It is found in Title 32, Chapter 6, of
" the Revised Statutes relating to 'Public Lands,'
" and in its terms refers clearly and exclusively to
" the public domain.

" This more clearly appears upon an examina-
" tion of the original act, taking context and all
" together.

" The case of *Newhall* vs. *Sanger*, decided by
" the Supreme Court of the United States, during
" the present month, settles the principle as I
" have stated. This case was cited at the argu-
" ment, and I have it before me. The legal and
" equitable title then became united in plaintiffs in
" April, 1872; and they became invested with all
" the rights of riparian owners unimpaired by any
" act of Government. What are those rights?
" Their principal right is to have the water flow
" down to them in the channel substantially *undi-*
" *minished in quantity.* It certainly requires no
" argument or citation of authority to prove this.
" It has been the law since the time of the Year-
" Books, that a water-course is not to be diverted
" to the prejudice of a riparian proprietor below.
" This right can only be defeated by a grant, or
" by adverse user for the requisite period, circum-
" stances which do not exist in this case, as we
" have seen. This right to have the water flow
" down to plaintiffs *exists independently of the ques-*
" *tion as to what, if any, use they make of it.* The
" fact that the water is put to a useful purpose by

" them, however, rather strengthens their right to
" equitable relief by injunction. ' A diversion of
" ' water from complainant's mills, where valuable
" ' and expensive machinery is being used,' etc.,
" ' constitutes sufficient ground for an injunction.'
" (High on Injunctions, Sec. 504.) ' A manda-
" ' tory injunction may be granted to compel the
" ' restoration of water to its natural channel
" ' which has been wrongfully diverted therefrom.'
" (*Id.*, Sec. 512.)

" It follows that defendant, his agents, servants,
" and employees, must be restrained from divert-
" ing, or continuing to divert, the waters of Sisar
" Creek from their natural channel. Let a decree
" of perpetual injunction be entered accordingly,
" and served upon defendant."

This case was argued in the Supreme Court of California by Messrs. Granger and Williams for appellant, and Mr. Charles Fernald for respondents. No opinion was delivered by the Supreme Court of California in this case. The decision was rendered on the 4th day of February, 1878, and was in these words :

" Judgment and order affirmed."

The last case decided by the Supreme Court of California as to water rights is that of *Wilcox* vs. *Hausch et al.*, No. 7986, decided January 22, 1884; 1 West Coast Reporter, 481. The complaint in that case alleged, among other things, as follows :

" That plaintiff is, and for a long time has been,
" the owner, in fee, of the following described

" lands, situate in the county of Tulare, State of
" California, to-wit: (then follows description of
" land owned by plaintift). That a certain natu-
" ral stream of water, known as Mill Creek, but
" sometimes known as Visalia Creek, has always
" run through said lands, and furnished water to
" plaintiff for irrigation and the use of his live-
" stock, of which he has a large number pasturing
" on said lands."

(Transcript on Appeal in that case, pp. 1–2.)

The complainant then alleges a diversion of the water of said Mill Creek by the defendants. The sixth finding in that case is in these words:

" *Sixth*—That for one year prior to the con-
" struction of said dam and ditch there had been
" no water flowing in Mill Creek save and except
" such water as had flowed through the ancient
" heads, channels and sources of supply of said
" creek so cleared out, opened up and deepened
" as stated in the third finding above; and that
" without such work of opening and cleaning out
" such channels aforesaid, the waters would not
" flow through said creek, excepting during about
" six months in the year, when the waters of the
" Kaweah run into a swamp above said Mill
" Creek, and from said swamp through numerous
" channels and sloughs into and through said Mill
" Creek."

The decision of the Court was of follows:

" There was evidence to sustain the findings of
" Court. If it be conceded that as against a riparian
" owner below, a person not such, may turn into

" a natural stream, water which would not naturally
" flow therein, and again divert the quantity of
" water which he led to the stream, the fact that
" he has conducted *some* water to it will not au-
" thorize him to divert all the water of the stream ;
" and it is for him who has thus interfered with the
" natural flow to show that he has not taken from
" the stream more water than he led to it. Other-
" wise the plaintiff, riparian proprietor, is entitled
" to an injunction prohibiting the diversion of
" any water.

" Judgment and order affirmed."

Osgood vs. *The El Dorado Water and Deep Gravel Mining Co.*

This case is reported in *56 Cal. R., 571.*

That decision was nothing more than the recognition of the fact, that the defendant in that case had acquired, under the distinct legislation of Congress, vested rights of appropriation which could not be taken from him by the subsequent patent to the plaintiff.

We understand, in the Osgood case, the Court held, that the notice of the appropriation antedated, not only the patent of the plaintiff, but it antedated the acquisition by plaintiff of any fixed pre-emption right.

There were various notices of appropriation in that case, by Kirk & Bishop, the appropriators, and the grantors of the El Dorado Water and Deep Gravel Mining Co., but our Supreme Court held, that whatever were the defects in the previous notices, that the notice of 1867 was a good notice

of appropriation ; that whatever objections might be made to the manner in which the work was prosecuted by the appropriators previous to the spring of 1870, that, from that point of time (the spring of 1870) until its completion, the appropriators prosecuted their enterprise with reasonable diligence. In other words, that all the proceedings of Kirk & Bishop to effectuate the appropriation of the waters in controversy (both their notice and their work) antedated by some seventeen months the acquisition of any right by plaintiff to the lands through which such disputed water, in its natural course, flowed.

In that Osgood case, the Court says :

" It appears from the record, that in the year " 1856, a man by the name of Kirk conceived the " idea of constructing a canal from the vicinity of " Placerville, in El Dorado County, for the pur- " pose of conducting water from various sources " of supply in the Sierra Nevada Mountains to " the foot-hills and plains below, for mining, agri- " cultural, and other useful purposes." (p. 574, 575.)

Then the Court speaks of the difficulties of the enterprise, and mentions that Kirk conveyed one-half of his interest therein to Bishop ; that in February, 1867, Kirk and Bishop posted a new notice of appropriation, which notice distinctly referred to the Act of Congress of July, 1866, and says :

" After the passage of the Act of Congress of " July 26, 1866, to wit, in February or March, " 1867, Kirk posted at Echo Lake a notice, of " which the following is a copy :

" ' In conformity with an Act of Congress en-
" ' titled "An Act granting the right of way to
" ' " ditch and canal owners over the public lands,
" ' " and for other purposes," approved July, 1866,
" ' the undersigned hereby claim,' etc. (p. 575,
" 576.)

" The evidence on behalf of the plaintiff shows
" a patent issued to him by the Government of
" the United States under date of October 25,
" 1871." * * * * * (p. 577.)

Here was the statute of the United States giving an appropriator the right to take up this water. That right was exercised antecedent to the United States patent to plaintiff, which was dated October 25th, 1871. The point of the decision was, that inasmuch as Congress in 1866 and 1870 passed two statutes in reference to their own property, to-wit, the public lands; and inasmuch as, in pursuance of those statutes, Kirk and Bishop had gone and appropriated that particular stream in question, that when the patent was subsequently issued to the plaintiff—Osgood—it was issued subject to that prior appropriation. There is some general language in this opinion about the customs and rules in California as to the appropriation of water, but, we take it, that the point of the decision was, that the rights of the appropriators were vested under these two U. S. statutes of 1866 and 1870, before the issuance of plaintiff's patent of October, 1871.

The Court further says:

"The plaintiff's rights must therefore be held "to have attached on the 25th of October, 1871, "the date of the issuance of his patent. But at "that date, according to the testimony of Kirk, "and of Bishop as well, the grantors of the de- "fendant were in the active prosecution of the "work on the canal for the diversion, among "others, of the waters of Echo Lake. What- "ever may be said upon the question as to "whether—all things considered—the defendant's "grantors prosecuted the work with reasonable "diligence from its inception, we think there can "be no doubt that there is evidence in the record "tending to show reasonable prosecution of the "work from at least the spring of 1870 until its "completion, which testimony the jury, by their "verdict, found to be true. (pp. 578, 579.) * * "Thereafter he (Kirk) performed, from time to "time, work upon the canal, at considerable cost, "*but whether with sufficient diligence, had other* "*rights intervened, need not be determined.*" (p. 579.) * * *

"The principle of prior appropriation of water "on *the public lands* in California, where its artifi- "cial use for agricultural, mining and other like "purposes is absolutely essential, which has all "along been recognized and sanctioned by the "local customs, laws and decisions, was thus ex- "pressly recognized and sanctioned by the Su- "preme Court of the United States, and also by "the Act of Congress of 1866." (p. 580.)

That general language undoubtedly looks to the fact that such customs did exist in California, and that they did exist in the decisions of California, and yet no one can, by any possibility, find any such decision in the whole of the California Reports, except as between appropriators, and the same reservations are made in those decisions which we have heretofore mentioned, to wit: that they had no reference to cases involving ownership of land.

The Court continues:

"And in keeping with this policy, Congress "further provided, in Section 17 of the amenda- "tory Act approved July 9, 1870 (Copp's Mining "Decisions, 1873–74, p. 296), 'that all patents "'granted, or pre-emptions or homesteads "'allowed, shall be subject to any vested and "'accrued water rights, or rights to ditches and "'reservoirs used in connection with such water "'rights, as may have been acquired under or "'recognized by the ninth section of the Act of "'which this is amendatory,' to wit: the Act of "July 26, 1866." (pp. 580, 581.)

Now, this is the point of the decision:

"The defendant's grantors therefore had the "right to appropriate the water in controversy, "*and if they acquired a vested right therein prior* "*to the issuance of the plaintiff's patent, the plain-* "*tiff's rights, by express statutory enactment, are* "*subject to the rights of the defendant.*"

"This, of course, depends on the question, "whether the grantors of the defendant made a "valid appropriation of the water, and this, in "turn, on the question whether they gave proper "notice of their intention to appropriate it; and "if so, whether they prosecuted the work in that "behalf with reasonable diligence. If they gave "sufficient notice, and prosecuted the work with "reasonable diligence, there can be no doubt that, "on the completion of the work, their rights re-"lated back at least to the commencement of the "work." Page 581.

Now, that case of Osgood turns entirely upon those two statutes of the United States, and under those statutes it is very plain the case was altogether with the defendant. Undoubtedly the opinion contains some general language favorable to some of the positions of defendant's counsel, but the point and pith of the decision is that the rights of the appropriators were vested under the U. S. Statutes of 1866 and 1870, prior to the acquisition of any right by plaintiff. Certainly the decision does not pretend to construe the Civil Code, or to adjudicate as to the meaning and effect of the 1422 section thereof.

Since the code has made the distinct statement, that appropriation of water shall not affect riparian rights, how can any Court say that the legislation of this State in 1875 sanctioned the appropriation of water as against the riparian owner? How can any one say that, with the code staring them in the face, and not only so, but with re-

peated efforts in the Legislature of the State to repeal this portion of the code, and those efforts always unsuccessful? Time and time again, since the enactment of the Civil Code, have interested parties sought to repeal Section 1422, and time and time again have they been defeated in the State Legislature, as the journals of the Assembly and the Senate both show. These interested parties well knew that this Section 1422 had a pregnant meaning; otherwise, why their repeated attempts to repeal it?

The case of *Farley* vs. *Spring Valley M. & I. Co.*, 58 Cal., R. 142, merely affirms the doctrine enunciated in *Osgood* vs. *The El Dorado Water and Deep Gravel M. Co.*

State legislation as to the acquisition of water rights by appropriation.

The Legislature of California has never, either expressly or impliedly, declared, that the doctrine of riparian rights was abrogated, or that the doctrine of prior appropriation of water was substituted therefor. The first legislative recognition of mining customs or usages is to be found in the Civil Practice Act of April 29th, 1851.

Section 621 of that Act provides: "In actions respecting 'mining claims,' proof shall be "admitted of the customs, usages, or regulations "established and in force at the bar, or diggings "embracing such claim; and such customs, usages

" or regulations, *when not in conflict with the Con-*
" *stitution and laws of this State*, shall govern the
" decision of the action."

(Cal. Statutes, 1851, p. 149.)

This section in the Act of 1851, which has been the only legislative recognition of mining regulations, refers to disputes between miners, and the phraseology of that law, established in that early day in California, has simply been repeated in our present codes. (See Code of Civil Procedure, Section 748.) Its language is entirely inapplicable to mining usages, as they now exist; but there seems to have been an indisposition to, change it. Now, when are we to recognize the customs and usages and regulations of miners? In actions respecting mining claims, in litigation concerning mining claims, but that is no recognition of the right to acquire water by appropriation in an agricultural county and for agricultural purposes. Here, no question of mines—no question of mining rights—no question as to the precious metals in any way or shape is involved.

The next statute touching upon this question is the statute of May 15, 1854 (*California Statutes, 1854, pp. 180, 181*), creating a Board of Commissioners to regulate water-courses and the office of Overseer in certain named counties, including the county of Tulare.

"Sec. 3. The duties of the Commissioners "shall be to examine and direct such water "courses, and apportion the water among the in-"habitants," etc.

"Sec. 9. Where water rises on land owned "by any person, it shall not be subject to the pro-"visions of this Act; but in all cases after it has "passed beyond the limits of said lands, it may "be used as provided in this Act."

Showing that this Act was intended to apply to cases of land and waters not in the ownership of any one. Take the fourteenth section and see how it applies here:

"Sec. 14. No person or persons shall divert "the waters of any river, creek or stream from its "natural channel to the detriment of any other "person or persons located below them on any "such stream."

Parties shall not divert the waters to the prejudice of parties located below; that is no recognition of the doctrine of appropriation and the substitution of that doctrine for the doctrine of riparian rights. It seems to be rather the recognition of the doctrine of riparian rights, that the *supra* possessor shall do nothing to the prejudice of the *infra* proprietor. There were amendments to this Act in 1860, 1861 and 1862. (See 2d Hittell's Digest, Articles 7278 to 7292.) The only important amendment was to Section 14, above quoted. Since that amendment, Section 14 reads as follows:

" No person or persons shall divert the waters " of any river, creek or stream from its natural " channel to the detriment of any other person or " persons located below them on any such stream, " unless *previous* compensation be ascertained and " paid therefor under the provisions of this Act, " or under the provisions of other laws of this " State, authorizing the taking of private property " for public uses."

This State statute of 1854, with the amendments thereto of 1860, 1861, and 1862, applied to Tulare County. Ten years after the Act of 1854, in 1864, another Act was passed creating a Board of Water Commissioners for Tulare County, and this latter Act repealed the Act of 1854. See *California Statutes, 1863, 1864, page 375.* This last Act provides for the election of three Water Commissioners and prescribes their duties.

Section 10 says: " When water rises upon " lands owned by any person, it shall not be sub- " ject to the provisions of this Act, until it shall " have passed beyond the limits of said land; and " no person or persons shall divert the waters of " any river or stream from its natural channel, to " the detriment of any person or persons located " below them on the same stream."

" Sec. 12. All Acts of a general character con- " flicting with the provisions of this Act, so far as " applicable to the County of Tulare, are hereby " repealed."

Kern County was created out of the Counties

of Tulare and Los Angeles on the 2nd of April, 1866. There was a general Act to promote irrigation passed April, 1872, but it provided that it should not be applicable to the Counties of Fresno, Kern, Tulare, and Yolo. (*Cal. Statutes, 1871–72, pp. 945–948.*)

There was also the inauguration of a system of reclamation for swamp and overflowed lands passed in 1868. (*Cal. Statutes of 1867–68, page 514.*)

Now, that is all the legislation that has ever been had in this State, with the exception of the codes, up to the 4th of May, 1875, (the date of the Calloway Notice of Appropriation), in reference to the appropriation of water; and you cannot find a single word in any of that legislation which adopts or recognizes in any manner the proposition laid down in the statutes of the United States of 1866 and 1870, to-wit, recognizing that the doctrine of riparian ownership was, or should be, supplanted by the doctrine of prior appropriation. There is nothing in the decisions of the Courts of this State laying down any such doctrine, except as to miners on the public lands of the United States; and there is no statute in this State establishing any such doctrine, either previously or subsequently to May 4th, 1875.

There are three propositions which we submit are established by their mere statement:

1st. Defendant can claim nothing from the silent sanction by the Federal Government of the

use of its lands and waters by the miners of California, for mining purposes, since September 28th, 1850, because the lands in question (the lands owned and claimed by plaintiffs) have never been mining lands; and further, because on that date they ceased to be public lands of the United States, and became the absolute property of the State of California.

2d. Defendant can claim nothing from the Federal Statutes of 1866 and 1870, because those statutes solely related (and could only relate) to the public lands of the United States; and the lands in question (the lands owned and claimed by plaintiffs) ceased to be the property of the United States on the 28th of September, 1850.

3d. Defendant has no right, under the aforesaid State Statutes of 1854 and 1864 (applicable to Tulare county, and to Kern county when created in 1866), because it has neither claimed nor proved any right under either of said statutes.

Therefore, the whole right of defendant to appropriate the waters of Kern River by the Calloway Notice of Appropriation of May 4th, 1875, must depend upon the 621 section of the Practice Act of 1851 *(Cal. Statutes, 1851, p. 149)*, or upon the provisions of the Civil Code.

We again quote this section of the Act of 1851:

"In actions, respecting 'mining claims,' proof "shall be admitted of the customs, usages or reg-

" ulations established and in force at the bar, or
" diggings, embracing such claim ; and such cus-
" toms, usages, or regulations, when not in con-
" flict with the Constitution and laws of this State,
" shall govern the decision of the action."

It requires extraordinary hardihood and entire obliviousness of the rules of logical interpretation to claim, and to attempt to argue, that by this 621 section of the Practice Act of 1851 the long and well-established doctrine of riparian rights was abolished as to all the real property, agricultural as well as mining situate in the State of California; and that there was substituted in its place such custom or usage as was, or might thereafter be, established at some bar, or at some diggings, or at several bars, or at several diggings, or at all the bars, or at all the diggings.

Some of the answers to such a proposition, we summarize from Judge Sawyer's decision in the Debris Case :

1st. These customs, usages and regulations are to govern the decision only as to "mining claims"—as to the mode of acquiring and protecting such claims.

2d. They are only to govern in controversies between miners.

3d. They are local customs limited in their operation to the particular "bar" or "diggings" to which they relate.

4th. They have no relation to agricultural lands.

5th. They have no relation to lands owned in fee.

6th. They are only to prevail when not in conflict with the laws of the State.

7th. The wide differences between this section of the Practice Act of 1851 and the Federal Statutes of 1866 and 1870 are sufficiently obvious without enumeration.

See *Woodruff* vs. *North Bloomfield Gravel M. Co.*, 1 West Coast Reporter, pp. 224, 225, 226.

THE CIVIL CODE.

Respondent's counsel claim the codes were only the codifying and formulating of existing laws. We do not understand that the authority of the Commissioners was so limited.

There were two commissions for the purpose of making the Codes. The first Commission was created by the Act of March 28th, 1868, under which Messrs. Harmon, Currey and Barber were appointed "to revise and compile all the laws of this State now in force, or which may be passed at the 17th session of the Legislature." (Cal. Statutes, 1867–68, page 435.)

The second Code Commissioners were appointed by the Governor, under the Act of April 4th, 1870, and they were authorized to do some-

thing more than to revise and compile existing statutes. They were empowered "to recommend all such enactments as shall, in the judgment of the Commission, be necessary *to supply the defects* of, and give completeness to, the existing legislation of the State;" and they were also at liberty to use the labors of the first Code Commissioners, and, in the language of the statute, were to be "at liberty to introduce into such results any changes they may regard as necessary." (Cal. Statutes, 1869–70, page 774.)

These second Code Commissioners reported a code full of changes. It was just as essentially a new code as the Justinian Code, or the Code Napoleon. The Civil Code introduced various essential changes into our whole system of law.

Let us call attention to a few of those material changes: In the first place Section 4 changes the rule of construction as to statutes in derogation of the common law. The same section says: "*The Code establishes the law of this State respecting the subject to which it relates.*"

Section 20 of the Civil Code says: "All statute laws and rules heretofore in force in this State * * * are repealed or abrogated."

Section 49 changes personal rights, and changes the whole common law doctrine as to the action of seduction, and gives that action where it never existed before.

Section 49 also gives an entirely new action. There was an action at Common Law for the enticement or abduction of a wife away from her hus-

band. This Code gives an action, unknown to the Common Law, for the abduction of a husband from his wife, or a child from a parent.

Sections 1189 and 1191 change the forms of acknowledgments of instruments to be recorded.

Section 1263 changes entirely the requisitions of a declaration of homestead, and provides that it must contain an estimate of its actual cash value.

Section 1286 changed the law materially as to the execution of wills. Wills previously had to be executed according to our laws; but this section provided that wills should be valid executed according to the laws of the place where the will was made.

The Code made a most important change in the law of succession, which vested both the real and the personal property of the testator who died intestate in his personal representative as trustee, to pay debts and make distribution.

It made a new law as to written receipts. It changed the law as to a release by one of two or more joint debtors.

It changed the law as to unlawful contracts. It swept away all those provisions in insurance and other contracts, providing a statute of limitations in the contract itself. It changed the law as to warranty of title to personal property. It made a very important change in reference to the re-delivery of chattels deposited by several joint owners. The old rule was that such chattels must be re-delivered on the joint demand of the depositors, but the Code provided that the depositee might deliver to each his proper share of the chattels

deposited, provided they were capable of division. It made an important change in the law of landlord and tenant. The lessor of a building intended for the occupation of human beings, must put it in a condition fit for that purpose, and must repair all subsequent dilapidations, except those occasioned by the negligence of the tenant. That was a most complete change in the law of landlord and tenant.

Therefore, when counsel upon the other side say, that this Code was a mere compilation of existing laws, and was so intended and so passed, they are in error. There were a large number of important and material pieces of legislation expressed in this Code, which entirely changed the previous laws. Then we come to this matter of water. There is a full title of the Civil Code devoted to this matter of water appropriation. The Code, upon this subject of Water-Rights, formulated just the law, as we deduce it from the previous decisions of the Supreme Court of this State, to-wit: That as between appropriators, the first in point of time was first in point of right. But that that whole doctrine of the acquisition of water-rights by appropriation had no application to, and could not affect the rights of riparian proprietors. That is the way, in our opinion, the law stood at the time this Code was made, but if your Honors think otherwise, then the question is, what effect did the Code have in taking up this subject-matter, in regulating it, in providing what steps should be taken, in order that the appropri-

ation of water might become effectual; and then, what was meant by the Code when it said, in substance, that none of these provisions in reference to the appropriation of water, should touch or affect riparian rights? Was not that a clear, distinct, and emphatic enunciation of the legislative will? Did it not amount to this? Whatever the law has been previously, whatever doubt we may have entertained, whatever contests and difficulties may have taken place, about the appropriation of water, we now want to establish by legislation this whole subject upon a settled basis. We recognize the rights of appropriators as between themselves. We recognize the doctrine of relation as between appropriators. We hold, *as between appropriators*, that the right shall relate back to the time of the posting and record of the notice of appropriation, providing that that has been followed up by proper efforts and proper work to realize and carry out the enterprise. We recognize all that; but we now declare, that as against riparian proprietors, there shall be no such thing as the appropriation of water; thus carrying out and effectuating the Common Law idea and decision, that the ownership of land carries with it the ownership of the water flowing through it, and that no man can, by mere appropriation, deprive an owner of that water which is really a part and parcel of his land. All the rights of both the parties in this action accrued subsequent to this Code. The Code went into effect on the 1st of January, 1873. It notified the world, it notified the Calloway party, it notified the assignees of

the Calloway party, that whatever rights defendants might acquire as against other appropriators, they could not, as against riparian proprietors, acquire any rights whatever. The Calloway party had full notice of all this when they posted their notice of appropriation; and their grantees had full notice of the same when they went on operating and constructing their canal under that notice. They all knew that, as against appropriators, they had rights, and that their rights, by proper effort, would relate back to May 4th, 1875; but as against riparian owners, they had no rights whatever.

Contrast this legislation for one moment with the Federal legislation. Here is the Federal legislation under which the case of Osgood was decided, distinctly recognizing, both for mining and for agricultural purposes, the right of appropriating water; and distinctly recognizing the superior right of the first appropriator. On the other hand, here is our Civil Code especially declaring that that system of appropriation of water, which, of course, became the exclusive system of appropriation as soon as it was enacted in the Code, that system of appropriation by and through which, and by and through which alone, the Calloway party acquired all their rights, that that system should not touch or in any wise affect the rights of riparian proprietors. There was no exception made as to the public land of the State. This State, at the enactment of the Codes, was just as much a riparian owner as any individual proprietor. The Code Legislators did not say, We will allow ap-

propriation of water upon the public lands of this State, but we will not allow such appropriation as to any lands in private proprietorship; but they said, appropriation of water shall not affect the rights of any riparian proprietor. At that time, the State was the riparian proprietor of these lands. The argument then is, that the Calloway party could not, as against the State, appropriate the riparian rights of the State; their whole appropriation having taken place some two and a half years after the Codes went into effect; and that, as their appropriation could not affect the rights of the State, neither could it affect the rights of the grantee of the State, who purchased and paid that value which the State has fixed on these swamp and overflowed lands.

In this connection, perhaps, we had better advert to a proposition, heretofore omitted, in reference to the point of time from which some of our titles take date. We have spoken of our patents of January and February, 1876, necessarily relating back ten months to the time when our purchase from the State must have been complete, and our twenty per cent. on account of the purchase price must have been paid, which ten months would antedate the Calloway notice. Now in reference to those lands which we derived from the statutory grant of 1877 and '78, followed up by the judgment in the suit of *People* vs. *John Center*. The slightest perusal of that statute will show that the grant thereby made was a recognition of equities which had grown up under the Montgomery patent of 1867, eight years anterior

to the notice of appropriation by Calloway and associates. That statute recognized that we had acquired under the Montgomery patent, certain equitable rights to these swamp lands; that we had made large expenditures in reference to these lands under that patent; that that patent was in and of itself void and defective, and therefore permitted these owners to come into Court in the action of *The People* vs. *Center*, to vacate that Montgomery patent. We were allowed to intervene in that action and assert our equities. We did so; and in August, 1878, there was a final judgment rendered in the suit of *The People* vs. *Center*, in favor of the very plaintiffs, Lux, Miller and Crocker, confirming to them some of the lands counted on in this action. Among these lands, so confirmed to plaintiffs, were Sections 5 and 9, Township 30 South, Range 24 East.

Buena Vista Slough runs through Section 5, and Section 9 directly joins Section 5; then we have Sections 6 and 8 under one of our patents. Thus, plaintiffs own Sections 5, 6, 8 and 9, one body of land consisting of about 1,700 acres, through the northwest portion of which this slough flows. The whole of that body of land, being owned by one proprietor, is entitled to riparian rights from that slough. Section 5 is the one through which the slough runs; and Section 5 is the one which we derived from that judgment; and through this statute which refers back our rights, or rather our equities, as having been acquired under the Montgomery patent of 1867.

Attempts to Repeal the Provisions of the Code as to Riparian Proprietors.

Now let us refer to some attempts made to repeal the Code provision as to the rights of riparian owners. In the journal of the Senate of the twenty-third session, on page 844, mention is made of Senate Bill No. 257, entitled "An Act "to regulate riparian rights." That bill was aimed at Section 1422 of the Civil Code. It failed to pass the Senate.

Then, Senate Bill No. 359, on page 849 of the Senate journal of the twenty-third session, entitled "An Act to preserve water rights." This Bill was also directed against Section 1422 of the Civil Code, but it never passed the Senate.

Next, Senate Bill No. 360, on page 849 of the same journal, entitled, "An Act to repeal Section "1422 of the Civil Code," introduced into the Senate, but never passed. Then, Senate Bill No. 211, also introduced at the twenty-third session of the Legislature. This last bill only attempted a modification of Section 1422 of the Civil Code. It was entitled, "An Act to amend Section 1422 "of the Civil Code relating to water rights and "riparian proprietors." Its provisions were as follows:

"Section 1. The rights of riparian proprie- "tors are not affected by the provisions of this "title except as provided in this section. A ri- "parian proprietor is one through whose lands a "natural streams flows, or whose land borders "upon a natural stream, and he has only the

" right to the flow of sufficient water in such
" stream for culinary and household purposes and
" to water the live stock which he owns and keeps
" on his premises. This act shall take effect im-
" mediately."

The fate of this Bill No. 211 is shown on page 841 of the Senate journal of the twenty-third session, and on page 804 of the Assembly journal of same session. It passed the Senate, but never passed the Assembly. The appendix to these journals gives the number of the Bill, the title of the Bill, the page where it was introduced, and then they have two headings, "Passed Senate," and "Passed Assembly." Therefore, when there is a blank under either of these headings, it has not passed. Thus, Senate Bill No. 211 is marked under the heading "Passed Senate," page 364. Under the heading "Passed Assembly" there is no mark at all. And that shows that the Bill never passed the Assembly. None of these proposed Bills ever became laws.

Various attempts were also made in the twenty-fifth session of the Legislature of California (1883) to sanction the acquisition of water by appropriation, and to repeal Section 1,422 of the Civil Code, but all these attempts failed. Among these bills were the following:

"Senate Bill, No. 87. Introduced by Mr.
" Whitney, January 16, 1883," entitled, "An Act to
" promote irrigation and regulate the distribu-

" tion of water used therefor in the several coun-
" ties of this State."

"Senate Bill, No. 257. Introduced by Mr. Reddy, January, 1883," entitled "An Act to pro-
" vide for a system of irrigation, and for the or-
" ganization of Irrigation Districts."

"Assembly Bill, No. 16. Introduced by Mr.
" Wharton, January 10, 1883," entitled "An Act
" to compel individuals, companies, or corporations,
" owning or controlling water for purposes of irri-
" gation, to distribute the water *pro rata* among
" purchasers in times of scarcity."

"Assembly Bill, No. 105. Introduced by Mr.
" Wharton, January 12, 1883," entitled "An Act
" to provide for the appropriation by the State of
" the waters of all rivers, lakes, and flowing
" streams, other than navigable waters, for the
" purposes of irrigation, mining etc."

"Assembly Bill, No. 422. Introduced by Mr.
" Sweetland, February 8, 1883," entitled "An
" Act to amend the Civil Code of the State of
" California, relating to water rights, by amending
" Sections 1415, 1416 and 1420 of said Code, and
" by repealing Section 1422 of said Code, and by
" adding a new section to be known as Section
" 1422 of said Code, all relating to water rights."

The failure of these various bills, in the Legislatures of 1881 and 1883, clearly shows the unwillingness of the representatives of the people to change the law as to riparian rights, or to subject such rights to any doctrine of appropriation.

In the Constitutional Convention of California, held in 1878 and 1879, efforts were made to establish special provisions concerning water rights.

See, *Debates Constitutional Convention Cal., 1878–1879, Vol. 1, p. 81, 95, 101, 143, 151, 165.*

Nothing was done by that Convention touching the question of riparian rights.

Article 14 of the present Constitution of California embodies the whole action of that Constitutional Convention as to "water" or "water rights."

There is nothing in that Article which impairs the rights of the riparian proprietor, or enlarges those of the appropriator of water.

What is a Watercourse?

Angell says: "A watercourse consists of bed, banks and water."

That is a very stringent definition of a watercourse, and we find that definition very much modified. This book of Angell's is a very old text-book. The first edition was published about 1825. It was then a very small volume, but has since been enlarged and annotated. This definition of a watercourse given by Angell will also be found in Lord Hale's treatise, *De Jure Maris*, but modern text writers and modern cases clearly show that while this is a proper, it is not a necessary definition of a watercourse. The other side adopt this stringent definition: "A watercourse

consists of bed, banks and water," and then argue that even if there is a continuous stream flowing from Buena Vista Lake to Tulare Lake—even if the formation of the ground is such (whether you call it channel, or depression, or by any other name)—that it will carry water continuously between those two lakes, and with a certain definiteness, yet still if there is a single break anywhere in the banks of that slough throughout its course of fifty miles. If they can show that there is a single space in the course of that stream where there are no banks, but where there are merely depressions, that that defeats and destroys the character of this slough as a watercourse.

Now, as we understand the authorities, even where they adopt the stringent definition already mentioned, they add: "Where it usually or generally has bed and banks." The modern cases clearly establish that when the stream once has a defined channel and then breaks into surface water, and flows over a particular field as surface water, having no banks and having no depression, and assuming the shape of promiscuous surface water going over a particular field, or over a particular place, yet if it subsequently resumes its regular shape as a watercourse on the other side of that field, or space of ground, it shall still be considered as having all the elements of a watercourse despite that break. A stream to be a watercourse, according to the legal definition of a watercourse, need not have a bed and banks at every point and through every foot of its course; that is not the

idea, and that is not the expression of the authorities. Angell begins with the stringent definition already quoted. But let us see what his context is:

Angell Watercourses (7th Ed.) Sec. 4: "A "watercourse consists of bed, banks and water; "yet the water need not flow continually, and "there are many watercourses which are *some-* "*times* dry."

"There is, however, a distinction to be taken "in law between a regular flowing stream of wa- "ter, which at certain seasons is dried up, and "those occasional bursts of water, which in times "of freshet, or melting of ice and snow, descend "from the hills and inundate the country."

Certainly it cannot be argued, under the testimony in this case, in which we have taken up the history of this slough, generally, since 1844, and precisely, since 1854, that this slough is only an occasional stream, the result of some unusual freshet. Commencing with the first visit of Mr. Gibbs, in 1854, and his survey at that time, we have, from that point, year by year, given the history of this slough, and have shown that the annual flow of the waters of this slough was just as regular as the annual flow in the channel of Kern River. Whenever Kern River had its usual spring flow of water, it supplied (when not interrupted or diverted) annual tribute to Buena Vista Slough, and that has been the history of Kern River and Buena Vista Slough for more than twenty-five years last past.

Now, to say that that slough can be brought within the category of an occasional stream caused by an unusual or extraordinary freshet, is to disregard all testimony and all truth in this case. We have evidence that there have been large freshets, extraordinary freshets, covering the whole country. But these are exceptional. The general rule has been that the waters come down annually, in such a way that a portion of them flow directly into Buena Vista Slough, and thence towards Lake Tulare; and another portion of them flow through the slough into Lakes Buena Vista and Kern until those lakes are filled to a certain level, and after the waters have reached that level in the lakes, the flow from Kern River to the lakes ceases, and then all the waters of Kern River flow directly into Buena Vista Slough, and thence northward to Lake Tulare. Buena Vista Slough does not represent an occasional flow of water coming from an unusual freshet, or from the exceptional melting of snows; it comes annually and regularly.

Angell continues:

"To maintain the right to a watercourse or "brook, it must be made to appear that the water "*usually* flows in a certain direction, and by a "regular channel, with banks or sides."

By that word "usual," we understand Angell to mean, not throughout its whole course, but generally; that generally it is a defined stream; that we may find here and there a place where there is no bank on one side; that you

may find a place where there are no banks on either side, and where it is running through a slight depression in the ground; that you may find another place where it has assumed a shape of nothing more than promiscuous surface water; but if it resumes its shape further on as a watercourse, and if from its beginning to its end there is a certain amount of definiteness in the flow of the water, why then it does fulfil the definition which the authorities prescribe for a watercourse. It need not be shown to flow continually, and it may at times be dry, but it must have a well-defined and substantial existence. Limiting the definition in question in that way, can it be said, under the testimony, that this slough, running from Buena Vista Lake to Tulare Lake, and established during all these years to so run, has not a well-defined and substantial existence? Has any map of the country, including Tulare and Kern Counties, ever been seen where this slough is not delineated as flowing from Buena Vista Lake to Tulare Lake? We have proved that the individuals interested in this company, the defendant corporation, were somewhat concerned in the getting up of Map 4, and having it lithographed; and that it was a map gotten up under the supervision of Mr. James, their surveyor, and it showed, just as every other map did, a slough from Buena Vista Lake to Tulare Lake. That was the thought and belief of everybody, until the defendant in this suit made the contention that what everybody thought was so, and what everybody had

found was so during all these years, was not so—was a mistake and fiction. Buena Vista Slough, as the name of a watercourse, was just as well known as Kern was, as the name of a river. Buena Vista Slough has been spoken of as a familiar name by the witnesses on both sides. Many people have travelled along its course, have camped upon its banks, have watered their cattle in its stream, have crossed it in boats, and some few have navigated it for miles. Certainly it cannot with reason be said, that such a stream has not a sufficiently substantial existence to entitle it to the name of a watercourse.

When we come to look at text-writers other than Angell, we find a somewhat different definition of a watercourse.

Phear on Rights of Water, a much more modern writer than Angell, on page 31, gives, as one of the best definitions of a water-course, one by Lord Tenterden: "*Water flowing in a channel* " *between banks more or less defined.*" * * * " Thus, water rising naturally, making land spongy " and wet, and squandering itself over the surface, " has no public character whatever, although it " ultimately finds its way to, and feeds, a stream; " and, therefore, before it arrives at *any defined* " *natural channel*, it belongs solely to the owner " of the land which it covers, and he may deal " with it exactly as he thinks fit." * * * "The " same principle which enables an owner to deal " actively with water which has not assumed *the* " *character of a stream*, would protect him from

" having it artificially abstracted, however con-
" fusedly it might be dispersed over his land ; and
" it is, therefore, probable, although no such point
" seems yet to have been raised in reference to
" surface water, that an action would be held to lie
" against one who, by making a dyke or sinking a
" well on his own land, had drained a morass be-
" longing to his neighbor, unless, indeed, his ope-
" rations were limited to a convenient and reason-
" able user of his own property."

It will be observed that this latter definition is : " Water flowing in a channel between banks more " or less defined ; " and then again, the expression is used, as descriptive of a watercourse : " Any " defined natural channel," leaving out the addition of " banks or bed."

Now, turning to the case which Phear refers to, the case of *Dudden* vs. *The Guardians of Clutton Union* (1st Hurlstone and Norman, 627). He refers to that case for the purpose of showing what is a watercourse ; and when your Honors contrast Buena Vista Slough—this long, well defined stream, with the volume of water it carries, with its extent, with its depth, with its width, with its length—when your Honors contrast this stream with those streams which have been held in England and in America to satisfy and fulfil the definition of a watercourse, you will find that we have in this slough *much more* than is enough to constitute what the law calls a watercourse.

Dudden vs. *Guardians of Clutten Union.* "The "declaration stated that the plaintiff was possessed "of a mill, and by reason thereof was entitled to "the water of a certain stream in the usual and "accustomed flow and channel to the said mill, "without obstruction by the defendant, for work-"ing the same, and also to the water issuing and "flowing from a certain spring which fed the said "stream, without diminution by the defendants. "Breach: That the defendants wrongfully divert-"ed the flow of the stream, and wrongfully dimin-"ished the water issuing from the said spring by "constructing certain tanks and waterworks."

* * * * * *

"Prior to 1852, 'a spring called 'The Red "'House Spring,' which rose from the earth in a "field belonging to Captain Scobell, after a short "course fell into the stream on which the plain-"tiff's mill was situated. It was proved that "about the year 1835, the tenant of the field had "slightly altered the course in which the water "after rising from the spring flowed to the stream, "and that before such alteration, the current from "the spring flowed across the adjoining field to "the same stream *in a crooked channel or gully*, "in which water-cresses grew."

Now that is the channel, which the Court held entirely sufficient for a watercourse, waters which flowed from a spring in a crooked channel or gully in which water-cresses grew.

" The learned Judge told them that the ques-
" tions for their consideration were, whether there
" was a natural or defined watercourse *from the*
" *spring head to the stream*, and, if so, whether the
" defendant had diverted the water from this
" watercourse; that, if the water was only spread
" over the land, Captain Scobell might drain his
" land, or license the defendants to do so for him.
" The jury found a verdict for the plaintiff."

Pollock, C. B., says :

" The real question is, whether there is a nat-
" ural watercourse which, but for the acts done by
" the defendant, would have conveyed water to
" the stream, and from thence to the mill of the
" plaintiff. If there is a natural spring, the water
" from which flows into a *natural channel*, it can-
" not be lawfully diverted by anyone to the injury
" of the riparian proprietors."

Now there the channel held to be a watercourse was a *crooked channel or gully*.

In Washburn on Easements, 3rd edition, pp. 278, 279, (209), there is a definition of a watercourse :

"To maintain the right to a watercourse or brook,
" it must be made to appear that the water usually
" flows in a certain direction, and by a regular
" channel with banks or sides ; mere surface drain-
" age at certain seasons of the year, when the
" water is high, is not a stream or brook. Among
" the definitions of a watercourse which may be
" found in the books, the following by Bigelow, J ,
" in *Luther* vs. *Winnisimmet Company*, is perhaps

" the most accurate and compendious: 'A stream
" ' of water usually flowing in a definite channel,
" ' having a bed, sides or banks, and usually dis-
" ' charging itself into some other stream or body
" ' of water. To constitute a watercourse, the
" ' the size of the stream is not important; it
" ' might be very small, and the flow of the water
" ' need not be constant. But it must be some-
" ' thing more than a mere surface drainage over
" ' the entire face of a tract of land, occasioned
" ' by unusual freshets or other extraordinary
" ' causes."

Now, that definition, by showing what constitutes a watercourse, and also by showing what does not constitute a watercourse, gives a very accurate idea. In the first place, you will observe that it is a channel, not necessarily with banks, but it says with banks or sides; it is not a channel always having banks and sides, but usually flowing with sides or with banks, and, finally, something more than mere surface drainage.

Is not this slough, that runs fifty miles, something more than mere surface drainage? Take the testimony of defendant's own witnesses. Do they describe anything like surface drainage, when they speak of this slough, or when they meander this slough, particularly between Buena Vista Lake and the south end of Weed Island or Bonestell's? Is it possible to meander surface drainage in the way defendant's surveyors have meandered this slough? Which meandered slough they have expressed on their own maps.

In this same connection we refer particularly to the case of *Gillett* vs. *Johnson* (30th Conn. R. 180 to 183;) also to *Holker* vs. *Porritt* (Law R., 10 Exchequer Cases, 59 to 63.)

Another pertinent case is *Ennor* vs. *Barwell* (2d Giffard, 422 to 425:) "There remain, how-
" ever, two other parts of the case, which upon
" the conflicting evidence, and from the state of
" the law, as stated in some cases, have created
" the greatest difficulty in my mind. The plain-
" tiff claims to be entitled to have the water flow-
" ing from certain openings, which he calls springs,
" upon Stock's Hill, and claims that it shall be
" allowed to continue to flow, as his evidence
" shows it has flowed, towards and into Priddy
" minery, The defendant endeavors to support
" his case by stating that these openings upon
" Stock's Hill are not springs—that the water is
" merely rain-water, and that when it accumulates
" from heavy falls of rain in such quantities as to
" overflow these openings, *it does not flow in any*
" *defined or certain channel* down the Hill, or
" towards the Priddy minery. Upon the weight
" of the evidence I have come, though with some
" hesitation, to the conclusion that there is a
" sufficiently defined channel for that water to be
" within the protection of the Court. I am of
" opinion that the defendant's case, as to the water
" in these openings being merely stagnant water,
" and a collection of stagnant rain-water, has en-
" tirely failed. The truth of the case as to these
" openings is, I think, stated in a way which recon-

" ciles the whole of the evidence by the testimony
" of Professor Ansted. These openings are what
" may be called surface springs, and they are al-
" ways filled with water—water which percolates
" through the soil, probably (as in the case of
" other springs) rain-water. They occur generally
" near the higher parts of the land, and do not
" generally obtain their supply from water lodged
" at any considerable depth. I think it proved
" that there is a perennial supply of water arising
" from these springs upon Stock's Hill, and I
" think it is sufficiently established that the water
" from these surface springs would, but for the
" interruption occasioned by the defendant, be
" flowing now; and *from the inclination of the*
" *ground*, must flow into the Priddy minery.

" I think also, that although from the nature
" and situation of those surface springs, *the chan-*
" *nels cannot be expected to be very deeply furrowed*
" *or accurately defined*, yet I am clearly of opinion
" this cannot be considered as water casually fall-
" ing and occasionally diffused along the surface of
" the ground."

" Therefore I have come to the conclusion, that
" the water being supplied by accumulation and
" percolation, affording a continuous supply to
" these surface-springs, and from them, sometimes
" in abundance, at other times in a scanty degree,
" flowing naturally into the Priddy minery, the
" defendant, by digging a trench which intercepts
" the flow of that water from these springs, has
" intercepted the legal right of the plaintiff,
" Mr. Ennor; and that Mr. Ennor has established

" a sufficient *prima facie* case of an interruption
" of that water which, but for the interruption,
" would flow down to his land, and that he is there-
" fore entitled to the protection of this Court."

The clearest and strongest case that we have, is the case of *McComber* vs. *Godfrey*, 108 Mass., 219 to 222.

" The plaintiffs' counsel, in his opening to the
" jury, stated that the evidence would show that
" from time immemorial, a natural stream of water
" had flowed from a southerly direction across the
" road and upon the defendant's land, taking a
" northwesterly course across the defendant's
" land; that for a part of the way across the
" same it ran in a well-defined channel, but when
" it reached a point within about five rods of the
" plaintiff's adjoining land, *the water spread out*
" *over the surface of the ground, covering a space*
" *a few rods in width, and so ran upon and across*
" *the plaintiffs' land, which was a level meadow,*
" covering the same for several rods in width, and
" irrigating it in a valuable manner through its
" whole length, *about seven rods,* and thence on to
" other land of other owners beyond; that from
" the point where it so spread out over the sur-
" face on the defendant's land, *there was no defined*
" *channel,* either on the defendant's land, or
" through the whole length of the plaintiffs' land,
" and not until a short distance beyond the plain-
" tiffs' land, where it again formed a small brook,
" and ran off in a westerly direction to the river;
" that the plaintiffs' and defendant's lands formerly

" belonged to the same ancestor, and the division
" was made after his death by quit-claim deeds;
" and that the defendant diverted this stream on
" his own land near to the road, where it was a
" watercourse running in a defined channel, turn-
" ing it in a northerly direction, so that it ceased
" to flow upon the plaintiffs' land, thus injuring
" their lands and crops.

" Upon this opening statement, the Judge ruled
" that the plaintiffs' action could not be main-
" tained, and with the consent of parties reports
" the case before verdict for consideration by the
" Supreme Judicial Court. If the above ruling
" is correct, judgment is to be entered for the de-
" fendant; if it is incorrect, the case to be sent
" back for trial."

Chapman, C. J., says:

" The defendant admits the well-established
" principle, that where there is a natural water-
" course each successive riparian proprietor has a
" right of property in it, and may maintain an ac-
" tion against one who diverted it from coming
" down to his land. But he contends that the facts
" stated in the report are not sufficient to estab-
" lish the existence of such a watercourse. This
" is the only point now presented to us."

" We cannot doubt that water which has flowed
" from time immemorial in a well-defined channel
" till it comes upon the defendant's land, and
" again, after it has passed a short distance be-
" yond the plaintiffs' land, forms a brook, and
" thus runs across the land of several proprietors

" to a river into which it empties, is a natural
" watercourse when it thus flows. But the de-
" fendant contends that because at a point on his
" land, about five rods above the plaintiff's land,
" the water spreads out over the surface, covering
" a space of a few rods in width, and thus runs
" upon and across the plaintiffs' land, which is a
" level meadow, and covers the same for several
" rods in width, irrigating it in a valuable manner
" through its whole length, being about seven
" rods, *and during this whole length of twelve rods*
" (that is, 198 feet) *has no defined channel*, it ceases to
" be a watercourse, and is to be regarded as mere
" surface water, to the flow of which the plaintiffs
" have no right. If the whole of the stream had
" sunk into the defendant's soil, and no water
" remained to pass to the plaintiffs' land except
" under the surface, it would have ceased to be a
" watercourse, and the plaintiffs would have had
" no right to it. * * * Or if the water
" had only flowed in temporary outbursts, caused
" by melting snow or by rain, it would have been
" surface water, as in *Astley* vs. *Wolcott*, 11 Cush.,
" 192; the defendant might have diverted it, and
" the plaintiffs might have raised barriers on their
" land to prevent its flowing upon their lot be-
" low. * * * But where, owing to the
" level character of the land, *it spreads out over a*
" *wide space without any apparent banks, yet usu-*
" *ally flows in a continuous current*, and passes
" over the surface to the lands below, *it still con-*
" *tinues to be a watercourse.* * * * If
" the plaintiffs had erected a barrier to keep it

" from their land, it would evidently have accumu-
" lated, by its natural and regular flow, upon the
" defendant's land, not merely when there were
" melting snows or rains, but at all ordinary sea-
" sons."

" We cannot doubt that not only the defendant,
" but all the lower proprietors, could have main-
" tained an action against the plaintiff for any
" damage caused by such obstruction. For it has
" a regular and natural flow from a permanent
" source; *and its usual course is in a channel,*
" with a well-defined bed and banks."

Now that case goes behind the whole defense. The great mass of the defendant's testimony went to this point: If we can show the Court that at any particular crossing of this slough, throughout its whole length of fifty miles, we, in our expeditions through that swamp district, found no banks, but only a level space, then we break up this stream as a watercourse.

Now, in this last case, there was a small stream, which, for 12 rods, that is for 198 feet, had no banks and no definite channel. It had no banks for five rods (that is, 82½ feet), before it came to the land of plaintiffs, and had no banks through the full length of plaintiffs' land, to-wit, 198 feet. Along the plaintiff's land, it runs 198 feet without banks; along the defendant's land, it runs 82½ feet without banks (that is, 280½ feet without any banks!). Does not that go behind the whole of this defence? All the exploring expeditions sent out by the defendant pending the trial,

to examine this slough, made *no attempt to trail it, to traverse it along its length,* but merely crossed it at (we submit) selected points. We have a right to argue, that where this slough is 50 miles in length, and where these Haggin henchmen cross it at several particular places, going across first from the east side to the west side, and returning back on the same track from the west side to the east side, that they manifestly and purposely confined their examination to particular crossings. Their chief investigation of the slough was at a selected crossing through sections 7, 8, 9, and 10, in T. 29 S., R. 23 E.; and along this same crossing defendant's surveyors took, what they are pleased to call, their levels.

Now, then, if this last case be law, the smallness of that stream as compared with the size and volume of this slough, simply strengthens our position. If a small stream like that can run for 280 feet without any banks, and yet be considered a watercourse, shall it be an impeachment of a slough fifty miles in length, that at one, two or three particular and selected crossings, witnesses found no banks, and no channelled bed? Plaintiffs have produced twenty-three witnesses, who have testified to the general course and flow of Buena Vista Slough, from Buena Vista Lake to Tulare Lake; and these witnesses are not men who went to the Swamp District to get information and make themselves witnesses, but they are men who went there on business, who lived there, who camped there, who slept there, and who did this year after year, in the pursuit of their ordinary avocations.

Bearing in mind what constitutes a watercourse, can that title be denied to Buena Vista Slough under the undisputed facts of this case?

Look at the streams described in the foregoing authorities, adjudicated to be watercourses, adjudicated to entitle their proprietors to riparian rights, and then contrast them with this slough? Consider the length, the breadth, the volume of water, the long and well-known existence of Buena Vista Slough, and then decide whether it is not a watercourse in the full and complete meaning of that title?

The Great Valley of California.

One of the marked physical features of the Pacific Coast is the great valley of California.

This valley lies parallel with the general direction of the Coast, between the Sierra Nevada on the east and the Coast Range of mountains on the west. It is 450 miles in length, and extends from the town of Shasta on the north to Tejon Pass on the south, while it has an average width of from 70 to 80 miles.

All the land in this valley, below an elevation of 300 feet above the level of the sea, comprises 8,000,000 of acres. The water system of this great valley finds egress to the Pacific Ocean through a depression in the Coast Range of mountains, marked by Suisun, San Pablo and San Francisco bays.

The northern part of this great valley is drained by the Sacramento River, which rises near the base of Mount Shasta, and its tributaries.

The southern and larger part of this great valley drains northwestward into the same bays—Suisun, San Pablo and San Francisco.

The principal rivers of the southern part of this great valley are, commencing at the south : Kern, Tule, Kaweah, Kings, San Joaquin, Chowchilla, Merced, Tuolumne, Stanislaus and Calaveras.

All these ten streams last named, rise in the Sierra Nevada, run in a general southwest course towards the Coast Range, until they strike "the trough of the great valley."

After the waters of the various rivers, which constitute the water system of the southern part of this great valley, strike "the trough" of that valley, they flow, according to the grade of "that trough," northwestward, towards the general emptying basin for the whole of that water system, to-wit: Suisun, San Pablo and San Francisco bays.

Kern River, by and through Buena Vista Slough, empties into Tulare Lake. The rivers, Tule, Kaweah and Kings, also empty into Tulare Lake. Summit Lake, Fish Slough and Fresno Slough, connect Tulare Lake with the San Joaquin River. The rivers, Chowchilla, Merced, Tuolumne, Stanislaus and Calaveras, all flow into the San Joaquin River, and the last named river empties into Suisun bay. The Sacramento river also empties into Suisun bay, and the united waters of the great valley of California then flow,

through Suisun, San Pablo and San Francisco bays, into the Pacific Ocean. (Professor Davidson, *Record, Vol. 2, pp. 369, 370, 371.*)

No outlet for the waters of Kern River and Kern and Buena Vista Lakes, except through Buena Vista Slough.

Kern Lake, Buena Vista Lake, and Buena Vista Slough, are all situate in "the trough" of this great valley. Bakersfield is 400 feet above the level of the sea. That is testified to by both Professor Davidson and Colonel Mendell. Kern Lake and Buena Vista Lake are about 290 feet above the level of the sea, so that the lakes are 110 feet below Bakersfield. From Bakersfield to Kern Lake, Colonel Mendell and Professor Davidson both say the fall is about 7½ feet to the mile, and from Bakersfield to Buena Vista Lake about 6 feet to the mile. The fall along the channel of New River is 6 feet to the mile. The fall from Bakersfield to Buena Vista Slough, at or near Cole's bridge, must be greater than the fall between Bakersfield and Buena Vista Lake, because Buena Vista Slough is the nearer point, and we have got now down into the trough of the valley.

Professor Davidson says that the flow of the waters of Kern River, and that the same is true of all rivers of this valley flowing from the west slope of the Sierra Nevada, is first southwest until they reach "the trough of the valley." He goes on to say Kern Lake, Buena Vista Lake and

Buena Vista Slough, are situated in "this trough" of the valley. There is no outlet for the waters in "this trough" except to the northwest. (*Professor Davidson Record*, vol. 2, p. 369, 370.) The distance from Buena Vista Lake to Tulare Lake is 52 miles. Now the surveyors of Haggin & Carr—Mr. James, Mr. Fillebrown and Mr. MacMurdo—who had been making surveys for years around these localities, could not tell us what the outlet was for the waters of "this trough" of the valley.

There must be some outlet for these waters. The topography of the country establishes that. But the Haggin & Carr surveyors could not possibly suggest where that outlet was.

Professor Davidson, who had examined those lakes, said he found no outlet at all except to the northwest, along Buena Vista Slough; that is the only place he could see an outlet. James, Fillebrown and MacMurdo could not discover any other outlet, but would not acknowledge that Buena Vista Slough was the outlet. So what did the ingenuity of the defense suggest? Why, after this water has been flowing, according to the testimony, for over thirty years, down and through Buena Vista Slough, the theory is advanced that all the surplus water of Kern Kiver and the two lakes is caught up—something in the style of the prophet Elijah—into the heavens; that it rarifies, vaporizes and evaporates. Its outlet is in the clouds! That was the only way they could get rid of this surplus water; it went off by evaporation. They could not tell, and

they would not tell, that if an increased flow of water came down Kern River it could only escape by and through Buena Vista Slough ; and so they adopted the extraordinary theory of evaporation, which argued that there never could come down enough water to Buena Vista and Kern Lakes to more than fill those lakes—a theory contradicted by the whole history of the lakes and slough for the last thirty years.

The reason of the spring overflow of Buena Vista Slough is, that when the water comes down suddenly and copiously in the spring, and the two lakes become filled, Buena Vista Slough then has not the capacity to carry away the waters of Kern River as rapidly as they flow into "the trough of "the Valley."

The slough is not large enough for the exigency of the moment, and there is an overflow. This, however, does not happen annually, but it sometimes does happen from the waters of Kern River coming down with more than ordinary force and volume. But, as the witnesses say, even in such case, as the spring advances, the water is carried off northwestward through the slough, and the overflow subsides. It seems to us that the configuration of this country, the fact that there is a steep slope from Bakersfield down to Buena Vista Slough and the two lakes—the fact that the lakes and the slough are in "the trough of the valley" —the fact that there is no other outlet for the waters of Kern River except to the northwest—the fact that the fall along the course of Buena Vista Slough is two feet to the mile, as testified

to by Mr. Crocker, and not contradicted, and the fact that as a rule the waters of Kern River more than fill the two lakes, and must have some outlet —these facts (which have all existed as far back as the memory of man extends), attest that there must be a stream in the place and along the course where our evidence locates this Buena Vista Slough. There must, in the very nature of things be a stream where we claim this slough is, and with a fall of two feet to the mile along its course that slough must have a current.

Our testimony very fully proves that the flow of water in and through Buena Vista Slough is an annual flow, and quite as regular as the flow of water in Kern River itself. We do not invoke the history of Kern River and the two lakes for the last three years, because we admit that the diversion of water by the Calloway and other canals has changed the whole flow of the waters of Kern River; but we say, that before the Calloway canal went into practical operation, say up to the year 1877, the lakes were always more than full, and there was always, except in years of drought, abundance of water for Buena Vista Slough. If this was usually so, then we claim that Buena Vista Slough was a sufficiently constant stream, being annual in its flow, to constitute a watercourse.

We do not understand that there is any testimony in this case to show that the flow of water down Buena Vista Slough, on this grade of two feet to the mile, was any less regular than the annual flow of Kern River. Of course, if it was a

dry season, and a very small amount of water came down Kern River, then there would be an insufficient supply of water both to the two lakes and to the slough. That sometimes happened, but it was the exception, not the rule.

To the suggestion that the waters of Buena Vista Slough are but the overflow of the two lakes, we would answer that the testimony establishes a direct flow of water from Kern River into Buena Vista Slough. In fact, all the water of Buena Vista Slough comes directly, and not through the medium of the lakes, from Kern River. Through the north and middle forks of New River, and partially from the south fork of New River, the waters of Kern River flowed directly into Buena Vista Slough. That was a direct flow, and we think the testimony upon that point is perfectly conclusive. The waters of the north fork and the middle fork of New River always did flow northward after reaching Buena Vista Slough, and so also did a part of the waters of the south fork of New River. We understand, of course, that it is claimed by the defence that the obstructions at Cole's Bridge and Cole's Crossing, by the Baker dam, and by the Souther dam, and by the Wible dam, caused the direct northward flow of water in Buena Vista Slough. But the difficulty of that position is this: that this northward flow of the waters of Buena Vista Slough existed long before there was any dam at Cole's Crossing. When Mr. Gibbs, Deputy United States Surveyor, went there in 1854, what did he find, before any dam was ever built there? He

crossed that slough in three places; in 1854, and he found the waters of that slough at every place running to the northwest, and this he noted in his field notes at the time, and the original field notes he produced at the trial of this suit.

When Mr. Gibbs visited the Swamp District in 1854, he found Buena Vista Slough, and located it almost precisely as it is located now; and he found it deeper than it is now, and he found the current invariably flowing, even at Tracy's Crossing, where he made one of his crossings, to the northward. That was before there had been any disturbance at Cole's Crossing by way of levee, or by way of dam. We claim, therefore, that the configuration of the country establishes that the waters must flow through this northwest outlet, Buena Vista Slough, towards Tulare Lake; and we claim that the testimony shows that a substantial part of the waters of Kern River, after reaching Buena Vista Slough, do flow directly to the northwest, and that after the two lakes have received their complement of water, then all the waters of Kern River, after reaching the slough, flow in a northwesterly direction along the lands of the plaintiffs.

When we consider the history of Kern River, it will be seen that the flow of water to Buena Vista Slough has always been a direct flow from that river. Previous to the year 1862, when all the waters went down South Fork, it will be recollected that South Fork connected with the east end of Kern Lake, and the water then flowed from Kern Lake through the connecting slough

and through Buena Vista Lake to Buena Vista Slough, That was a direct flow of water from Kern River to Buena Vista Slough. There was no reflux or backflow, so to speak; it was entirely and truly a direct flow. In 1862, when the main channel of Kern River was changed from South Fork to Old River, then the waters of Old River poured into the connecting slough between Kern Lake and Buena Vista Lake, and there was a regular flow through the connecting slough and Buena Vista Lake to Buena Vista Slough. In both of these periods in the history of Kern River (that is, previous to 1862 and between 1862 and 1868), the whole flow of the waters of that river to Buena Vista Slough was a direct flow. The flood of 1868 transferred the main channel of the river from Old River to New River, its present channel. Thereafter the waters of Kern River emptied into Buena Vista Slough by three forks—the North, Middle and South Forks Assuming for the argument (although contrary to the fact) that no water flows directly from the forks of New River down Buena Vista Slough, and that the waters of New River flow directly into the lakes; yet when those lakes attain a certain level, then the waters of New River cease to flow into the lakes, and all flow down Buena Vista Slough. As soon as the lakes are filled, the waters from the river cease to flow south, and all flow northward down the slough. That is to say, that as soon as the lakes are filled, the water from the river does not first flow into the lakes, and then flow back into the slough; but the

water of the river, when the early spring flood has filled the lakes to a certain level, ceases to flow into the lakes at all, and all flows northward, and down the slough. There is, therefore, no question of reflux. There is no question of back water. The waters of Kern River flow into the lakes, and as soon as those lakes have reached a certain level, or as soon as the capacity of the lakes is satisfied, they cease to flow into the lakes and then all flow directly down to Buena Vista Slough. Of course, as soon as those lakes have been filled to the full of their capacity, then the water cannot flow into the lakes, because when the waters of the river come down to Cole's crossing, they would there encounter on the southward a level of water which they could not override, and so, instead of going south at all, they flow directly northwest through Buena Vista Slough. Whether you consider the history of Kern River during the period that South Fork was the main channel, or during the period that Old River was the main channel, or since New River has become the main channel, during each of several periods, the flow of its waters to Buena Vista Slough has never been a reflux, but always a direct flow.

The Act of Congress of July 26, 1866, amended in 1870, in no manner affects the rights of plaintiffs, nor does it aid the defendant. Long before the Act was passed, the lands described in the amended complaint had passed from the United States, and the title had vested in the State of California. (2d and 79th findings.)

Judge Garber, in his oral argument made in this case asserted in a very positive manner, that there was no case in the books in which it was held that the Act of Congress of 1866, relating to water rights on public lands, was not retroactive in its operation. We at that time referred him to the cases cited on page 429 of our first brief. In the brief last filed by counsel for defendant this claim is re-asserted, but they have not taken the trouble to examine, or even refer to a single authority cited by us, and to which we on the argument specially called their attention. We claim that the Act of Congress of 1866 was not intended to and could not in any manner affect the rights of the State in or to swamp and overflowed land, as that land was granted to the State of California by the Act of September 28th, 1850, and was a grant *in presenti.*

" This Court has decided more than once that " the Swamp Land Act was a grant *in presenti.*"
French vs. *Fyan*, 93 U. S., 170.

See *Railroad Company* vs. *Smith*, 9 Wallace, 95.

And after that date, Sept. 28, 1850, the swamp and overflowed land in the State of California ceased to be "public land," and could in no manner be affected by any Act that Congress might pass, and it will be seen by reading the Act of Congress granting the right of way to ditches and canal owners that it was limited in its operation to "public lands."

We again refer your Honors to the cases cited by us in our first brief, at page 429.

The first case we call attention to is the unreported case of *Blanchard* vs. *Bracken*, No. 5,809, decided in this Court on the 4th of February, 1878. This was a case appealed from the First District Court. The case was tried before Judge Fawcett, and his decision appears in full in the transcript, and it appears that the point was made that the Act of Congress of July 26th, 1866, affected the claim by parties under an imperfect title, the legal title still remaining in the Government. Judge Fawcett in his opinion on page 10, of the transcript, says:

"But in reply to this doctrine defendant ar-
"gues that by the Act of Congress of July 26,
"1866 (2 Bright Dig., p. 404, Chap. 21, Sec. 105;
"U. S. Revised Statutes, Secs. 2339–40), his
"right to appropriate water on the public lands is
"recognized and protected; that, since the United
"States was the legal holder of the title to the
"lands now claimed by plaintiffs, at the time of
"the appropriation of the water by defendant,

" and down to April, 1872, the patent vested the
" title in plaintiffs, subject to the right carved out
" of or reserved from the estate.

" The Act in question embraces only *public*
" *lands* of the United States. It does not follow
" that all the lands to which the United States
" holds the legal title are *public lands*. The
" Government may hold as trustee as well as an
" individual. Lands embraced within a confirmed
" Mexican grant are not public lands; they are
" not part of the public domain. The whole
" equitable estate is vested in the confirmee and
" his successors, and the Government holds the
" naked legal title only, and in trust, until the
" patent issues. Plaintiffs' lands are of this class,
" and it would not be competent for Congress, or
" any other power, to grant away, diminish or de-
" stroy their estate. *Nor does the Act purport to*
" *do so. It is found in Title 32, Chapter 6, of the*
" *Revised Statutes, relating to 'Public Lands,' and*
" *and in its terms refers clearly and exclusively to*
" *the public domain.*

" This more clearly appears upon an examina-
" tion of the original Act, taking context and all
" together.

" The case of *Newhall* vs. *Sanger*, decided by
" the Supreme Court of the United States during
" the present month, settles the principle as I
" have stated. This case was cited at the argu-
" ment and I have it before me."

This point was also urged in the Supreme Court, but the Supreme Court affirmed the judgment of the lower Court from the bench.

The next case we refer to, is the *Union Mill and Mining Company* vs. *Ferris*, 2d Sawyer, page 176. On page 185, the Court, referring to this Act, say: "But the Act is prospective in its oper-"ation, and cannot be construed so as to divest a "part of an estate, granted before its passage. If "it be admitted that Congress has power to divest "a vested right, by giving a statute a retro-"spective operation, that interpretation will never "be adopted without absolute necessity." (*Blanchard* vs. *Sprague*, 3 Sum., 535. *Van Sickle* vs. *Haines*, 7 Nev., 249.)

This question was again presented in the Circuit Court in the case of the *Union Mill and Mining Company* vs. *Dangberg*, 2d Sawyer, page 450. In that case the parties claiming rights as riparian proprietors, only held a certificate of purchase for the lands claimed by them, and to which they asserted riparian rights attached, and on page 455, the Court say: "A point made by the plain-"tiff, is, that some of the defendants who have "entered and paid for their land, and received a "certificate of purchase, but no patent as yet, have "no title by virtue of which they can claim and "exercise riparian rights. It is true that such de-"fendants have not the strict legal title, but it is "settled that the entry and payment, and certifi-"cate thereof convey the equitable title. There-

" after the land ceases to be public, and the Gov-
" ernment has no right to sell it again, but holds
" the legal title in trust for the purchaser. The
" land is no longer the property of the United
" States, and may be taxed by the State without
" violating the compact not to tax United States
" property. (*People* vs. *Shearer*, 30 Cal., 548;
" *Carroll* vs. *Safford*, 3 How., 441; *Witherspoon*
" vs. *Duncan*, 4 Wall., 210; *Hughes* vs. *United*
" *States*, 4 Wall., 232.) They have also the actual
" possession as well as the beneficial estate or in-
" terest in the land, and as such possessors and
" equitable owners are entitled to enjoy all the in-
" cidents to the land, and its ownership, as well as
" the land itself. The patent, when issued, relates
" back to the original entry, the inception of title,
" so far as is necessary to protect the purchaser's
" right to the land. (Id. and *Gibson* vs. *Chouteau*,
" 13 Wall., 92.) *Upon these authorities it is evi-*
" *dent that the plaintiff's objection is groundless.*
" *The defendants are, to all intents and purposes,*
" *the owners of the land, and entitled to riparian*
" *rights.* So, too, we consider that the defendant
" who has entered land under the Homestead Act,
" and continues to reside thereon, being rightfully
" in possession, in pursuance of a law of the
" United States, is entitled to use the waters of
" the stream as other riparian proprietors may."

" *We must also hold, since the patent when is-*
" *sued will relate back to the inception of title, that*
" *is, the original entry and payment, that one, who*
" *entered and paid for his land prior to the passage*

" *of the Act of Congress, of July 26, 1866, entitled*
" ' *An Act granting the right of way to ditch and*
" ' *canal owners, over the public lands, and for*
" ' *other purposes,' has his land and the water upon*
" *it unaffected by the Act.*"

Here we have a direct adjudication upon the very question as to the rights of parties situated precisely as the plaintiffs in this case were, claiming simply under a certificate of purchase which conveyed the equitable title, the State holding the legal title in trust for them until the patents for the land should be issued.

In this connection we also refer the Court to the case of *Witherspoon* vs. *Duncan*, 4 Wallace, page 218, where the Supreme Court of the United States say: " *The contract of purchase is*
" *complete when the certificate of entry is executed*
" *and delivered, and thereafter the land ceases to*
" *be a part of the public domain.* The Govern-
" ment agrees to make proper conveyance as
" soon as it can, and in the meantime holds the
" legal fee in trust for the purchaser who has the
" equitable title. As the patent emanates directly
" from the President, it necessarily happens that
" years elapse before, in the regular course of busi-
" ness in the Land Office, it can issue."

So it appears in this case, that at least ten months must elapse after a party applying to purchase swamp and overflowed lands has made his first payment upon such land before he can obtain a patent for the land which he has applied for and made such payment upon. See pages 103, 104 and 105 of our first brief.

The Supreme Court of the United States in a case, *Wilcox* vs. *Jackson*, 13 Pet., 498, in speaking of the effect of an Act of Congress upon land which had been severed from the mass of public lands, say: "But we go further, and say that "whensoever a tract of land shall have been once "legally appropriated to any purpose, from that "moment, the land thus appropriated becomes "severed from the mass of public lands, AND THAT "NO SUBSEQUENT LAW OR PROCLAMATION OR SALE "SHOULD BE CONSTRUED TO EMBRACE IT OR OPER-"ATE UPON IT, ALTHOUGH NO RESERVATION WERE "MADE OF IT."

In the case of *Leavenworth etc. R. R. Company* vs. *United States*, 92 U. S., page 745, the above passage from 13 Pets. Report is quoted, and after such quotation the Court say: "It may be urged "that it was not necessary in deciding that case "to pass upon the question, but however this "may be, the principle asserted is sound and "reasonable, and we accept it as a rule of con-"struction."

The case of *Newhall* vs. *Sanger*, 92 U. S., page 761, referred to by Judge Fawcett in *Blanchard* vs. *Bracken*, defines what is meant by the term "public land," as used in Acts of Congress, the Court say: "the words 'public lands' "are habitually used in our Legislature to de-"scribe such as are subject to sale or other dis-"posal under general laws" (p. 763). And no one will for a moment claim that any of the swamp and

overflowed lands claimed by plaintiffs in this case, and to which they hold certificates of purchase, was subject to sale or disposal under any general law of Congress. On September 28, 1850, that swamp land ceased to be public land, and ever after that time belonged to the State of California, subject to its disposal in such manner as the Legislature of this State should prescribe.

This question has also been before the Supreme Court of our sister State, Nevada, in a case certainly deserving of attention at the hands defendant's counsel.

In the case of *Vansickle* vs. *Haines* (7 Nev., 249) it was contended by the defendant that the plaintiffs who acquired title from the United States could not complain of the diversion of water by the defendant, on the ground that the right to divert water upon public lands was recognized and authorized by the Act of Congress of July, 1866, and they further claimed that the fact that the patent of the plaintiff ante-dated the Act of Congress in no manner affected the right of Congress to pass an Act that would not only affect the lands at the time of its passage owned by the United States, but those also which it had granted to private parties. Passing upon this claim of defendant, the Court say, on page 280: "The Act "of Congress of July, 1866, if it shows anything, "shows that no diversion had previously been au- "thorized; for if it had, whence the necessity of "passing that Act, which appears simply to have "been adopted to protect those who at that time

" were diverting water from its natural channel ?
" Doubtless, all patents issued, or titles acquired
" from the United States since July, 1866, are
" obtained subject to the rights existing at that
" time ; but this is a different case, for *if the ap-*
" *pellant has any right to the water, he acquired it*
" *by the patent issued to him two years before that*
" *time, and with which, therefore, Congress could*
" *not interfere.*"

And this very point is referred to by Garber, J. in his concurring opinion. He says :

" If I believed that a re-argument could throw
" any additional light on the questions involved, I
" would unhesitatingly advise the granting of the
" petition. *Because I feel sensibly that the deci-*
" *sion we have been compelled to render, in obedience*
" *to the law as it was written, and which it is*
" *our function to declare, and not to alter, may*
" *work great hardship in this particular case* ; AND,
" AS A GENERAL RULE APPLICABLE TO A CERTAIN
" CLASS OF PATENTS, MAY DISAPPOINT EXPECTATIONS
" LONG, THOUGH ERRONEOUSLY CONSIDERED BY THE
" PUBLIC AS WELL FOUNDED. * * *

" After as thorough an investigation as I
" am capable of making I feel constrained to
" concur in the decision so fully elaborated by the
" Chief Justice, *that on every point essential to*
" *the case of the petitioner, not merely the weight*
" *of authority, but all the authorities are against*
him." (page 290.)

See also *Woodruff* vs. *North Bloomfield G. M. Co.*, 1 West C. R., p. 200–1.

Mason v Austin, 46 Cal. 385

It is claimed by counsel for respondent that the case of *Osgood* vs. *El Dorado Company*, 56 Cal., 571, supports their contention in this regard. Rightly understood, we do not think it does. Mr. Pomeroy, in his article on Riparian Rights, in the West Coast Reporter, of January 31, 1884, in a note at the foot of page 437, shows very clearly what was decided in that case. And his understanding of what the Court decided in that case is the same as that clearly expressed by one of your Honors from the bench when this case was on argument.

Mr. Pomeroy says: "It is true that the report-
" er's head note represents the Court as laying
" down the following general rule: 'In a question
" ' of priority of right between an appropriator of
" ' water on the public lands and a pre-emptor, the
" ' rights of the latter date from the issuance of his
" ' patent.' It is also true Mr. Justice Ross says
" in his opinion, 'The plaintiff's rights must,
" ' therefore, be held to have attached on the
" ' twenty-fifth of October, 1871, the date of the
" ' issuance of his patent.' But this language can
" not have been intended to lay down a general
" rule applicable to all pre-emptors; it must have
" referred entirely to the particular facts of that
" case. This plainly appears from the sentence
" immediately preceding, and from the cases which
" he cites in support of his conclusion—these very
" cases recognizing the rule that a grantee's right
" *may* relate back to a date before that of his pat-
" ent. He says: 'The plaintiff seeks to invoke

" ' the doctrine of relation; but, for obvious rea-
" ' sons, no case was made for the application of
" ' that doctrine.' The plaintiff took possession
" of his land several years before it was surveyed.
" It was surveyed in 1865. In June, 1868, he
" filed his first declaration as a pre-emptor; in
" 1870 he had paid up, and in 1881 he received
" his patent. But the defendants had taken their
" first step, from which their rights of appropria-
" tion arose, in March, 1867. It thus appears
" that, even if the plaintiff's title did relate back
" to the date of his declaration in 1868, it was
" still subsequent to defendant's right of appropri-
" ation, which accrued in 1867. The remark that
" plaintiff's title attached at the date of his patent
" was not, therefore, essential to the decision act-
" ually made on the facts."

We also refer to this article by Mr. Pomeroy, where the effect of the Act of Congress of July, 1866, is fully considered, in the following numbers of the West Coast Reporter, Nos. 3, 4, 5, and 6.

The pretended rights of the defendant as licensee of the United States Government.

It is claimed by counsel for defendant that the defendant is a grantee and licensee of the United States, who, as owner of the land along the bank of Kern River, has the right to divert and use the water of Kern River upon lands distant from and not on the banks of the river. This view of de-

fendant's counsel was adopted by the lower Court as we find by reading the second conclusion of law (T. I., folio 467).

"The defendant became the grantee of the "United States as riparian owner as aforesaid of "the waters, ways, rights and privileges by it "appropriated and claimed as aforesaid, and that "the amount and manner of said appropriation "was reasonable and proper, and did not exceed "what the United States as riparian owner, or "the defendant as the grantee and licensee of "such riparian owner, had the right to divert and "use in the manner and to the extent to which "the defendant has diverted and used the same, "and the amount of water so diverted and used "would have been considered reasonable as be-"tween an upper and a lower proprietor."

A riparian owner cannot except as against himself confer on one who is not a riparian owner any right to use the water of a stream, and any use by a non-riparian proprietor, even under the grant of a riparian owner is wrongful if it sensibly affects the flow of water by the land of other riparian proprietors.

In support of this proposition, we refer the Court to a case recently decided in the English Court of Appeals, *Ormerod* vs. *Todmorden, Joint Stock Mill Co., Limited,* reported in (L. R.) II Q. B. D., page 155. This case will also be found in the Albany Law Journal, of Nov. 4, 1883. The plaintiffs in that case were riparian owners on the

Burnley river, and they complained that the defendants had injuriously affected their rights as such riparian owners, by conducting part of the water of the river to their—the defendants'—mill, where some of it was lost and the remainder returned to the river in a heated condition, so that the quantity of the water when it arrived at the plaintiffs' mill is sensibly diminished, and its quality sensibly deteriorated.

The Burnley river, it appears, is a small stream. Measurements taken in June and July gave from 520 to 580 feet per minute; taken in January it gave from 1700 to 1850 feet per minute, another measurement in July gave 400 feet per minute.

The defendants were not riparian owners, but by means of a pipe laid through the land of a riparian owner, about 50 yards above the plaintiffs' intake, they conducted 38 feet of water per minute to their works. This water they used for condensing purposes, and after using it they returned 37 feet per minute to the river, three or four yards below the point at which it was taken out. The remainder was consumed in the defendants' works or lost in its passage to or from them.

The defendants attempted to show that the effect produced at the plaintiffs' intake, was almost entirely owing to the water from two other mills, and relating to this claim of the defendants, the Court say: "If twelve other persons were to use "the water in the same way, and to the same ex-"tent as the defendants, it cannot be doubted that "the plaintiff would sustain substantial and serious "injury; yet if this contention of the defendants

" is correct, the plaintiff would have no remedy
" against any one of the thirteen, because no one
" of them alone caused substantial damage. If I
" am right in this view, it is incumbent on the de-
" fendant to justify their interference of plaintiffs'
" right, by showing either, that they are them-
" selves riparian owners, in which case the finding
" of the jury in answer to the second finding and
" question, would entitle them to a verdict, or if
" not riparian owners, they are notwithstanding,
" entitled to affect the plaintiffs' right to the same
" extent, as they might have done if they were ri-
" parian owners. (p. 159.)

The Court then refers to the cases relied upon by the defendants' counsel in this case, in which they claim that it lays down the doctrine, that flowing water in a stream is *publici juris*, and states that such decisions were mere dicta, and are not regarded as law.

The Court then continues: "There remains,
" however, a more serious contention, viz., that the
" riparian proprietor has a part of his right to
" what Lord Kingsdown calls the extraordinary
" use of water, or may sell it to persons who are
" not riparian owners, subject to the limitation
" which applies to the use of it by himself for
" extraordinary purposes, viz., that he does not
" thereby interfere with the lawful use of the
" water by the other proprietors, and inflict upon
" them a sensible injury.

" As to this contention, it seems to me, that
" the decision of a majority of Court in *Stockport*
" *Water Works Co.* vs. *Potter* (3 H. & C., 300) is

" in point as expressly deciding that a riparian
" owner cannot, except as against himself, confer
" on one who is not a riparian owner any right to
" use the water of the stream, and that any user
" of the stream by a non-riparian owner, even
" under a grant from the riparian proprietor, is
" wrongful, if it sensibly affects the flow of water
" by the lands of other riparian proprietors."
(pages 161–2.)

The foregoing quotations are taken from the opinions of Cave, Judge, before whom the case was tried. On appeal, three Judges of the Court of Appeals wrote opinions in the case. Brett, M. R., says: " I think that this judgment must be affirmed.
" Upon argument before us, two points have
" been satisfactorily established: First—There
" is ample evidence that the plaintiffs are riparian
" owners, and, in my opinion, we are bound to
" treat them so; Secondly—I think that there is no
" evidence that the defendants are riparian
" owners." (page 167.)

It appeared that the defendant claimed the right to take the water from the river by virtue of a deed from one Schofield granting certain rights to the defendant, and the Court say " the deed is
" drawn up in somewhat confused language, be-
" cause Schofield wished not to make himself lia-
" ble to other persons; but it is clear that he did
" not convey the ownership of any part of the
" river. The defendants have taken nothing in
" the soil which abuts upon the river. They do not
" own a single inch of the bank—they are not ri-
" parian owners, then, are they entitled to the

" rights of riparian owners? The answer depends
" upon whether the decision of the majority of the
" Court of Exchequer in the case of *Stockport Water*
" *Works* vs. *Potter* can be supported; we must
" take the ground of the decision to be as stated.
" The question there was, whether the rights of a
" riparian proprietor can be assigned, and the fol-
" lowing doctrine was laid down in the judgment
" (3 H. & C., pages 326 and 327):

" ' There seems to be no authority for contend-
" ' ing that a riparian proprietor can keep the land
" ' abutting on the river, possession of which gives
" ' him his water rights, and at the same time trans-
" ' fer those rights, or any of them, and thus create
" ' a right in gross by assigning a portion of his
" ' rights appurtenant. It seems to us clear, that the
" ' rights which a riparian proprietor has, with re-
" ' spect to the water, are entirely derived from his
" ' possession of land abutting on the river.

" ' If he grants away any portion of his land so
" ' abutting, then the grantee becomes a riparian
" ' proprietor, and has similar rights. *But if he*
" ' *grants away a portion of his estate not abutting*
" ' *on the river, then clearly the grantee of the land*
" ' *would have no water rights merely simply by*
" ' *virtue of his occupation. Can he have them by*
" ' *express grant? It seems to us that a true answer*
" ' *to this is that he can have them against the*
" ' *grantor but not so as to sue other persons in his*
" ' *own name for an infringement of them.* This
" ' passage contains the reason of the decision

" ' of the majority. The grantee has his rights
" ' against the grantor, but not as against any one
" ' besides.' " (pages 169–70.)

Lindley, L. J., says: " I think the judgment of
" Cabe, Judge, ought not to be reversed. We
" must take it that the plaintiffs are riparian pro-
" prietors, but with respect to the defendants are
" they riparian proprietors, and have they any
" possession or ownership of the soil abutting on
" the river? I think this question must be an-
" swered in the negative. Schofield granted by
" deed the power to lay pipes, but did not in
" terms grant the right to take water, for he in-
" tended, no doubt, to protect himself from any
" consequences of a grant like that.

" Nothwithstanding the execution of the deed,
" Schofield could take as much water out of the
" river as he pleased; and if we were to hold that
" the defendants are riparian proprietors it would
" follow that the riparian proprietor might grant
" rights overflowing water to any number of per-
" sons, and that these rights would be of an un-
" limited kind." (page 170.)

Bowen, L. J., says: " I am of the same opinion.
" It has been found by the jury that the plaintiffs
" are riparian owners; and if the finding of the
" jury is wrong, it must be corrected by a motion
" for a new trial. Then have the plaintiffs a right
" of action against the defendants? Running
" water is not *bonum vacans*, it is only *publici juris*,
" as is pointed out in the judgment in *Embrey* vs.
" *Owen* (6 Ex., 353 at p. 369). It has long been
" established that running water is not a subject

" of property, and that the first occupant cannot
" acquire an exclusive right to it. The only right
" annexed to it, is to have it flow in some course,
" and it has been long held that the adjoining
" owners are entitled to have the water flow in
" the natural course of the stream."

The plaintiffs in this case deny that, under the circumstances, the defendants can claim to be riparian owners ; or, that a riparian owner can transfer his right to strangers ; he can only confer rights in the water as against himself, and not against others.

We claim that this decision is applicable to this case, as it appears that all of the land irrigated from the canal of the defendant, is owned by Haggin and Carr, with the exception of a single section.

James testifies, trans. 4, folio 968, as follows :

" There are 13,000 acres of land being culti-
" vated along that canal (referring to the Callo-
" way).

" Q. How much of that 13,000 acres is being
" cultivated by the tenants of Haggin & Carr ?

" A. I think most of it."

Mr. Macmurdo, after testifying that quite a number of parties cultivate land along the Calloway canal, says :

" Q. Was all this occupied by the tenants of
" Haggin & Carr, that you have called off ?

" A. All but Section 19. This Poso Creek
" settlement that I have referred to, is composed

" of ranchers, people and families living there,
" having ranches there and beyond Section 27.

" Q. Are those ranches occupied by tenants of
" Haggin & Carr ?

" A. Some of them.

" Q. Nearly all, are they not ?

" A. I don't know exactly how many are, and
" how many are not. A good many of them are
" tenants of Haggin & Carr, a great many of them.

" Q. It is a settlement composed nearly wholly
" of the tenants of Haggin & Carr, isn't it ?

" A. Well, there are a great many tenants of
" Haggin & Carr; I don't know what proportion.
" I suppose more of them are his tenants than
" otherwise. There is a man by the name of
" Martin who is not a tenant; and Cox & Clark
" had a ranch out there. That ranch is in the
" Poso settlement. I cannot recollect any one
" else just now. I could not say how many ten-
" ants Haggin & Carr have out there. There are
" several besides those whose names I have called,
" but I don't recall their names." (T. IV., fols. 1225–7.

It appears by the testimony of Col. Mendell and Prof. Davidson, and the testimony of several of the witnesses for the defendant, that all the land cultivated along the Calloway canal, is what is known as desert land, (T. II. folio 1582.) and the Court finds as a fact (finding 42) "that the defen-
" dant is not the owner of any land, and never
" has been a riparian proprietor on said Kern
" river." (T. I., folio 403.)

Even if we admitted that the defendant was a riparian owner upon Kern river still, it would have no right to take water from the river to irrigate desert land, miles away from its bank.

In the case of the *City of Emporia* vs. *Soden*, 25 Kansas, 588, the city being a riparian owner on a stream, claimed the right to take water from such stream, conduct it to the city and supply the residents of such city with water for domestic purposes. The Court held that the city in such a case could not be held as taking water for its natural wants, or for its own use, but that it took the water to supply a multiude of individuals, that is, that it took it to sell and not to use.

In that case, the city claimed the right to take the water under an act of the Legislature, which authorized the taking of water "for the purpose of "supplying the inhabitants of such city with wa- "ter for domestic use, the extinguishment of fires, "and for manufacturing and other purposes."

And the Court say: "It would be strange if "the city could destroy the plaintiff's water power "without compensation, and then sell it to other "manufacturers, and thus build up a rival estab- "lishment."

"The same question was before the Supreme "Court of Alabama, and in a well considered case "the same conclusion was reached.

In the case referred to, *Stein* vs. *Burdan*, 24 Alabama, 146, the Court say: "A city as riparian "owner cannot from the fact of owning land upon "a water course acquire the right to di- "vert water in sufficient quantities to supply *do-*

" *mestic* wants of its inhabitants residing at a dis-
" tance of from three to five miles, to the injury
" of other proprietors. That would in itself be
" unreasonable and unjust."

Again, when parties claimed under an act of the Legislature authorizing an appropriation of water to supply the city of Mobile with water, the Court say: " We fully recognize this right in the
" assumption and appropriation by the sovereign of
" private property for public purposes, but, it can
" only be exercised on making just compensation
" to the owner. Constitution Alabama, Art. 1, Sec.
" 13. We fully admit that the affording to a city or
" town to a supply of water is a public use, within
" the meaning of the Statute, but the act under
" which the appellants claim, did not and could
" not confer upon him the power to deprive other
" proprietors of the right they have in the water
" which is indeed, a part of their freehold.

" This, we held in the case of *Burdan* vs. *Stein*,
" 24 Alabama.

" Stein can obtain the right to the water by
" pursuing the course pointed out by the Statute
" (Acts 41, page), but until he does this, the
" rights of the owners are not disturbed and they
" may resort to any legal or equitable remedies
" which the law offers to redress the injury or
" prevent its continuance." (*Burdan* vs. *Stein*,
" 27 Alabama, 116.)"

No Necessity of an Action at Law to Establish the Right of Plainliffs before the aid of a Court of Equity can be invoked.

Upon this proposition, we submit the following authorities:

Dodsley vs. *Kinnersly*, 1 Ambler, 402, 405; *Hoffheins* vs. *Brandt*, 3 Fisher Patent Cases, 220.

"There at one time prevailed in the Circuit "Courts of the United States the idea that the "Court, as a Court of Equity, would interfere in "aid of a patentee only where his patent "was sanctioned by general acquiescence for "many years, or had been maintained at "law by the verdict of a jury who had "passed upon the novelty and utility of the in-"vention when called in question. But I think "that the current of decisions of the last few "years has been otherwise; and that Courts of "several of the circuits have held (and these de-"cisions, too, have been made by the presiding "Judges of these circuits, who are members of "the Supreme Court,) that the grant of jurisdic-"tion is as full in equity as it is at law. To sus-"tain that view, I refer to *Allen* vs. *Blunt*, "1 Blatch., 486; *Nevins* vs. *Johnson*, 3 Blatch., "82; *Sanders* vs. *Logan*, Am. Law Reg., vol. "9, 1861, p. 475. (Vol. II, p. 167.")

Goodyear vs. *Day*, 2 Wallace, Jr., 296, 297, 298, Grier, J.: "It is true that in England the "Chancellor will generally not grant a final and

" perpetual injunction in patent cases, when the
" answer denies the validity of the patent, with-
" out sending the parties to law to have that ques-
" tion decided. But even then the rule is not ab-
" solute or universal; it is a practice founded
" more on convenience than necessity. It always
" rests on the sound discretion of the Court. A
" trial at law is ordered by a Chancellor to inform
" his conscience; not because either party may
" demand it as a right, or that a Court of Equity
" is incompetent to judge of questions of fact, or
" of legal titles. In the Courts of the United
" States, the practice is by no means so general
" as in England, or as it would be here, if the
" trouble of trying issues at law devolved upon
" a different Court." * * * * *

" In a late case, involving the validity of
" Morse's telegraph patents, which was heard in
" Philadelphia, a final injunction was decreed
" without a verdict to establish the patents; and
" many other cases might be cited from other cir-
" cuits, if necessary, in support of this practice,
" showing that the Courts of the United States
" do not always consider it a proper exercise of
" their discretion to order such issues to be tried
" at law, before granting a final injunction."

McMillan vs. *Barclay*, 5 Fisher Patent Cases, 189, Syllabus: "A trial at law is not a pre-
" requisite to the exercise of the equity jurisdic-
" tion of the Circuit Court."

The American Cotton Tie Supply Company vs. *McCready*, 17 Blatch. 291: "Under Sec. 4921 of
" the Revised Statutes, the authority of this

" Court, in a case arising under the patent laws, " of which it has jurisdiction, to grant an injunc- " tion, according to the course and principles of " Courts of Equity, to prevent the violation of any " right secured by a patent, *is entirely independent* " *of the award of any other relief in the same suit.*" (pp. 301, 302.)

"*Ballou* vs. *Inhabitants of Hopkinton*, 4 Gray: " Bill in equity, filed on the 7th of June, 1853, " to restrain the defendants from letting off and " wasting the water in a reservoir on Mill River, " situated in the towns of Hopkinton, Milford and " Sefton." (Page 324.)

" Shaw, C. J.: The only questions in the pres- " ent case are, whether this Court have jurisdiction " in equity to restrain and prohibit the defend- " ants from drawing off water from the plaintiff's " reservoir, established for the purpose of supply- " ing the several mills of the plaintiff's, on one " and the same stream; and whether it is a fit " case for the Court to exercise that jurisdiction, " rather than leave the plaintiffs to their action at " law to recover damages for the injuries done " them respectively diminishing the water at their " respective mills." * * * * *

" The case set forth in the bill is alleged to " consist in an injury done by the defendants to " the incorporeal hereditaments of the several " plaintiffs in wasting the water which would flow " to their mills when it would be useful and bene- " ficial to them, and thereby impairing and dimin- " ishing their water power. This is technically a " private nuisance, the appropriate remedy for

" which, at law, would be an action on the case
" for a disturbance. In such action at law, the
" remedy would be a verdict for nominal damages
" for the disturbance of the plaintiffs' right; but
" if actual damage were proved to have been sus-
" tained, as the natural consequence of such in-
" terruption, then for such sum as would be a
" compensation therefor up to the time of the
" verdict, or of the action brought. Being, by
" the rules of law, a nuisance, we have no doubt
" that it is within the Rev. Sts. c. 81, § 8, Ch. 8,
" giving this Court jurisdiction in equity, 'in all
" 'suits concerning waste and nuisance.' "

Boston Water Power Co. vs. *Boston and Worcester Railroad* 16 Pick., 512: "The other ques-
" tion is whether, taking the subject of the com-
" plaint as the plaintiffs have stated it, the billl
" shows that the plaintiffs have such a plain, ade-
" quate and complete remedy at law, that, accord-
" ing to the precedents and rules of equity, a bill
" ought not to be sustained, so that the demurrer
" is well taken to it on that ground.

" Upon this question, the Court are of opinion
" that the case shows no such adequate and com-
" plete remedy at law as to deprive them of the
" right of proceeding in equity, and that the de-
" murrer ought not to be sustained.

" Some of the most prominent reasons for this
" determination are these: Although the plain-
" tiffs are several owners of separate and distinct
" mills, injured by the alleged stoppage, diversion
" and waste of the water of Mill River, and to
" recover damages for which each owner must

" bring his several action at law to obtain a
" remedy for his particular injury, yet they have
" a joint and common right in the natural flow of
" the stream, and in the reservoir by which its
" power is increased, and a joint interest in the
" remedy, which equity alone can afford, in main-
" taining a regular flow of the water of the reser-
" voir at suitable and proper times, so as best to
" subserve the equal rights of them all. The
" remedy in equity therefore would, by one decree
" in one suit, prevent a multiplicity of actions.

" The remedy in equity would be more ade-
" quate and complete. At law, each plaintiff
" would recover only the damages then actually
" sustained, when the action is brought, whereas
" a decree in equity would look to the future, and
" prevent continuance of the injury and cause of
" damage, and thereby afford a more ample and
" complete remedy. (pp. 327, 328.)

Campbell vs. *Seaman*, 63 New York, 568, 582,
" Prior to Lord Eldon's time, injunctions were
" rarely issued by Courts of Equity. During the
" many years he sat upon the woolsack, this
" remedy was resorted to with increasing fre-
" quency, and with the development of equity
" jurisprudence, which has taken place since his
" time, it is well said that the writ of injunction
" has become the right arm of the Court. It was
" formerly rarely issued in the case of a nuisance
" until plaintiff's rights had been established at
" law, and the doctrine which seems now to pre-
" vail in Pennsylvania, that the writ is not matter

" of right, but of grace, to a large extent pre-
" vailed. *But now a suit at law is no longer a*
" *necessary preliminary, and the right to an in-*
" *junction, in a proper case, in England and most*
" *of the States, is just as fixed and certain as the*
" *right to any other provisional remedy.*" (p. 582.)

Corning vs. *Troy Iron and Nail Factory*, 40 New York, 205, 206, 207. " The question then
" comes to this, whether the defendant, who has
" wrongfully diverted from the plaintiffs a stream
" affording such a water power, shall be permitted
" to continue such wrongful diversion, and thus
" to deprive the plaintiffs of what is clearly theirs
" without their assent, upon the ground simply
" that its restoration would be a great damage to
" it. In other words, that by its continuance
" wrongfully to appropriate to its own use the
" property of the plaintiffs, it derives a much
" greater benefit than the plaintiffs could by being
" restored to their own. The bare statement of the
" question would seem to suggest the only proper
" answer. The very idea of Justice is to give to
" each one his due. The use of the natural
" flow of the stream is the due of the plaintiffs,
" and to justify withholding it from them requires
" some better reason than loss to the wrongdoer
" consequent upon its restoration. It is insisted
" that the equitable right of restoration has been
" lost by delay. The statute of limitation,
" either at law or in equity, has not attached so as
" to bar the right. The case has, therefore, no
" analogy to that class of cases where equity has

" refused relief upon the ground that the legal
" remedy was barred by the statute. The defend-
" ant has expended no money upon improvements
" since the expiration of the lease, consequently
" the principle of the cases holding that where,
" during the delay of a party in asserting his
" right, expenditures have been made in improve-
" ments, equity will not interfere, do not apply.
" *Lewis* vs. *Chapman*, 3 Beavan, is one of this
" class. The plaintiff sought to restrain, by in-
" junction, the publication of a work of which he
" was the owner of a copy-right. It appeared
" that he had lain still for six years and upwards,
" and seen the defendant expending his money
" in printing the work, etc., etc., upon this ground
" equity refused to relieve the plaintiff. There
" are numerous cases of this description found in
" the books, but they all rest upon the same prin-
" ciple. All there is of the delay in this
" case is, that the plaintiffs finding the
" defendant using their water power, have
" permitted it to continue such use for about
" four years. Clearly this indulgence furnishes no
" reason for the refusal of equity to aid the plain-
" tiffs in the recovery of their legal rights. It is
" insisted by the defendant, that equity ought not
" to interpose in behalf of the plaintiffs, for the
" reason that they do not want the water power,
" afforded by the stream, for use. This is a mere
" assumption. It is true, they have not hereto-
" fore used the power, perhaps, for the very good
" reason that they have not had the ability to use
" it, on account of the defendant's withholding it

" from them. It is said that the plaintiffs have
" erected no machinery for that purpose. This is
" true. The plaintiffs have not constructed ma-
" chinery to rot while litigating with the defend-
" ant for the recovery of the stream. But if the
" facts claimed were clearly established, it would
" not protect the defendant in wrongfully with-
" holding the stream. No man is justified in
" withholding property from the owner, when
" required to surrender it, on the ground that
" he does not need its use. The plaintiffs may
" do what they will with their own. Upon es-
" tablished principles, this is a proper case of
" equity jurisdiction. First, upon the ground
" that the remedy at law is inadequate. The
" plaintiffs are entitled to the flow of the stream, in
" its natural channel. Legal remedies cannot re-
" store it to them, and secure them in the enjoy-
" ment of it. Hence the duty of a Court of
" Equity to interpose for the accomplishment of
" that result. A further ground requiring the in-
" terposition of equity is to avoid multiplicity of
" actions. If equity refuses its aid the only rem-
" edy of the plaintiffs, whose rights have been
" established, will be to commence suits from day
" to day, and thus endeavor to make it for the in-
" terest of the defendant to do justice by restor-
" ing the stream to its channel. If the plaintiffs
" have no other means of recovering their rights,
" there is a great defect in jurisprudence. But
" there is no such defect. The right of the plain-
" tiffs to the equitable relief sought, is established
" by authority as well as principle. (*Webb* vs.

" *The Portland Manufacturing Co.*, 3 Sumner,
" 190. and cases cited; *Tyler* vs. *Wilkison*, 4
" Mason, 400; *Townsend* vs. *McDonald*, 2 Ker-
" nan, 381; 2 Story's Equity, §§, 901, 926-7; Angell
" on Watercourses, §§ 449-50.) *It is further in-*
" *sisted by the defendant that equity will not in-*
" *terpose until the right has been settled at law.*
" *That, formerly, was the universal rule, where*
" *there was any substantial doubt as to the legal*
" *right. (Gardner vs. The Trustees of New-*
" *burgh*, 2 John. Chan., *162.*) *But that rule no*
" *longer prevails in this State.*"

If there has been any doubt on this question of more recent date, it is set at rest by the decision in the case of Penn. Lead Co.'s Appeal, XI Reporter, 246. In this case, the Court say:

" The appellant, however, contends that an in-
" junction ought not to issue until the right has
" been established at law. This suggestion would,
" in a doubtful case, have force. But to say that
" equity cannot move in any case until a jury has
" determined the nuisance to be an existing fact,
" is to make an equity system a mere dependent
" on the Common Law Courts. But a conclusion,
" such as this, does not accord with the intent of
" the Act of 1836; for, by it, the Judges of the
" Common Pleas are clothed with full and inde-
" pendent chancery powers over all the subjects
" therein mentioned. We may adopt the lan-
" guage of Earl, J., in *Campbell* vs. *Seaman*, 63
" N. Y., 568, speaking of injunctions against nuis-
" ances: 'A suit at law is no longer necessary,

" ' and the right to an injunction in a proper case
" ' in England and most of the States, is just as
" ' fixed and certain as the right to any other pro-
" ' visional remedy. The writ can rightfully be
" ' demanded to prevent irreparable injury, inter-
" ' minable litigation, and a multiplicity of suits,
" ' and its refusal in a proper case would be error
" ' to be corrected by an appellate jurisdiction. It
" ' is a matter of grace in no sense, except that it
" ' rests in the sound discretion of the Court.'
" Nor have our own Courts been less ready in
" adopting the same doctrine. See *Denny* vs.
" *Brownson*, 5 Casey, 382; Mason's Appeal, 20
" P. F. S., 26; Scheetz's Appeal, 11 Casey, 88."

Estoppel.—Laches.

It has been frequently said that the doctrine of estoppel applies to this case. We desire, *in limine*, to put your Honors in possession of the extravagant assertions made by counsel; extravagant, as we submit, so far as the law is concerned; extravagant, so far as the facts are concerned, and so far as deductions appear from those facts to be made; extravagant, so far as counsel seek to interpret the motives and feelings either of the plaintiffs or of the defendants. When we heard the eloquent gentleman describing the purity of defendants and the wickedness of the plaintiffs, showing how he had gone and psychologically entered into their interior being, and found in the Haggin & Carr department all purity and all vir-

tue, and in the bosom of the plaintiffs all wickedness and vileness, we were reminded of that description given by Cornelius O'Dowd, of the over-fervent and over-zealous lawyer, which will be found in *Blackwood's Magazine*, published a good many years ago: "Daily habit," says Cornelius (and this was Charles Lever who wrote under that name), "familiarizes us with the acting of the "barrister. His generous trustfulness, his love "of all that is good, his scorn for vice, his noble "pity, and the withering sarcasm with which he "scares the ill-doer, we know can be had, in com-"mon cases for ten pound ten shillings, and five "times as much will enlist in our service the same "qualities in a less diluted form; while, by quad-"rupling the latter sum, we arrive at a self-devo-"tion before which brotherly love pales, and old "friendships seem a cold and selfish indifferent-"ism. We had contracted for this man's acute-"ness, his subtilty, his quick perception, his "ready wit; but he gives, besides these, his hearty "trustfulness, his faith in our honor, his convic-"tion in our integrity. He knows our motives; "he has been inside our bosom, and comes out to "declare that all is pure and spotless there; and "this he does with a trembling lip and a swelling "throat, the sweat on his brow and the tear in his "eye. It being all the while a matter of mere ac-"cident that he had not been engaged on the op-"posite side, and all the love he bears the plain-"tiff been briefed for the defendant."

We think that is a fair picture of the over-fervent and over-zealous counsel, who desires to say,

perhaps, somewhat too much, and to take positions somewhat too extreme in his anxiety and zeal. One of these extravagant propositions was, and we submit it was exceedingly inaccurate, that we had stood by for nearly five years, and we had seen this work of construction going on; that we had —and we don't think we overstate their position— that we had substantially, by our silence and our conduct, encouraged the work. Well, now, what are the facts? What are the plain, cold facts? Why, the plain, cold facts are that some of our title upon which we sue in this case we never acquired until eight months before the suit was brought. If a man stands by without title, that is one thing; but if a man stands by with title, that is another thing. Our statutory grant here, under the Statute of 1877 and 1878, which ripened into a title by the judgment of the Twelfth District Court, rendered in August, 1878, and that covers some of the most important sections of land that we sue upon in this case, that we got in August, 1878, nine months before this suit, the action being brought on May 12, 1879. How can it be truly said, then, so far as all these lands are concerned, that we have stood by for nearly five years? Some of our titles were our patents from the State in 1877—the 15th of June, 1877. That was one of the most important patents in the case—a patent covering the west half of Sec. 10, one of the sections of this land through which we seek to show your Honors, the defendants' own witnesses admit that the Buena Vista Slough passes. Through Sec. 10 there is a well-defined and con-

tinuous slough, which they express upon their own maps; and the title to that section we never acquired until June, 1877, less than two years before the suit, the slough running right through the middle of that section, and covering a portion of the western half. Is it just, then, to say that we have stood by for five years? What are the facts? Mr. Lux and Mr. Miller reside over 300 miles from the place of this canal, and there is no evidence in the case that either one of them ever visited Kern County or saw Kern River, until Mr. Lux appeared at the trial of the cause, and the testimony of Mr. Crocker was that he had never seen the Calloway Canal until last fall, to-wit, the fall of 1880, the suit having been commenced on the 12th of May, 1879.

For none of the land in the amended complaint described, had a patent been issued for the period of five years befor the commencement of this suit (see second finding.) And it is well established that no period of time less than five years can estop a party from asserting his right to the water of a water-course that runs through his land, the water being a part and parcel of the land.

> *St. Helena Water Company* vs. *Forbes*, 62 California 182.
>
> *Silver Spring Bleaching & Dyeing Company* vs. *Waukuck Company*, 15 Reporter, 94.

The plaintiff having established by the introduction of their patents a perfect legal title to the land, their right to the water running through the

land can only be barred by the statutory period of five years. The Statute of Limitations does not run against the State, and so long as the title of the land through which the stream of water ran, remained in the State, there can be no use or enjoyment of the waters of the stream, which will avail the person so using as a foundation for title by prescription against the grantee of the State. In order that such use may ripen into a prescription title it must continue for the full period required by the Statute of Limitation after the title of the land has passed from the State.

Union Mill and Mining Company vs. *Ferris*, 2d Sawyer, 176.
Manley vs. *Howlett*, 55 California, 94.
Crandall vs. *Woods*, 8 Cal., 136.
American Company vs. *Bradford*, 27 Cal., 360.
Burdan vs. *Stein*, 27 Alabama, 117.

In order to establish the right to water by prescription the right to the use of water must have been asserted under the claim of title with the knowlege and acquiescence of the person having a prior right and must have been uninterrupted and the burden of proof of adverse uninterrupted user of the water for five years with the knowledge and acquiescence of the person having a prior right is cast on the party claiming it and if he leaves it doubtful whether the use was ad-

verse, known to the owner and uninterrupted it is not conclusive in his favor.

American Company vs. *Bradford*, 27 Cal., 360.

It does not appear that the plaintiffs, Miller & Lux, ever heard of the Calloway Canal, or of the fact that it was appropriating water from Kern River at any time. Both of them, it appears, reside in San Francisco, three hundred miles from where the Calloway was appropriating water from Kern River, and the other plaintiff testifies that he never saw the Calloway Canal until after this suit was commenced.

If plaintiffs had stood by and seen defendants erecting improvements on the river above them and diverting the water, they would not have been estopped from questioning such diversion.

In a case recently decided in banc in this Court, this very question was considered by this Court and in its decision the Court say: "We have "been cited to no authority and know of none "that holds that the bare fact that the ditch was "constructed with the knowledge of plaintiffs and "their grantors, and without objection on their part, "although at heavy cost, is sufficient to operate "as an estoppel. 'There must be some degree of "'turpitude in the conduct of the party beforet he "'Court in Equity will estop him from the asser-"'tion of his title—the effect of the estoppel be-

" 'ing to forfeit his property, and transfer its en-
" 'joyment to another. *Biddle Boggs* vs. *Merced*
" '*Mining Company*, 14 Cal., 368..' "

Stockman vs. *Riverside Land and I. Company*, 11 P. C. L. J., 640.

The Code of Civil Procedure requires the element of fraud to work an estoppel.

C. C. P., 1962, subdivision 3.
6 Wait's Actions and Defenses, 262."

In the case of *Ferris* vs. *Coover*, 10 Cal., 631, the following instruction to the jury was asked by the defendant, and refused :

" If you find that the plaintiff, or his grantors, or
" some of them, stood by and saw the defendant
" making valuable improvements, and did not in-
" terfere nor give any notice of an adverse claim to
" the lots, then you are entitled to find for the de-
" fendants," and the refusal of the Court to give this instruction was complained of in the Supreme Court as error.

" The principle contended for by this instruc-
" tions, is that silence on the part of the owner of
" premises as to his title may be urged by a tres-
" passer who is erecting valuable improvements
" upon them, as an estoppel against the assertion
" of the legal right of such owner. This would
" be extending the doctrine of equitable estoppel
" beyond all the precedents. That doctrine is
" based upon very different principles, and applies
" to very different cases from the one at bar. It
" arises where one is directly influenced to his
" own injury by the acts, declarations, or silence

" of another, in relation to the title of property,
" and is applied to protect against fraud on the
" one hand, and injury on the other. *Silence be-*
" *comes fraudulent only when the facts respecting*
" *the title are in the possession of one, and not of*
" *the other, and cannot be easily ascertained, and*
" *they are concealed with a view of misleading—*
" *not where the facts are notorious, or can be easily*
" *ascertained, as by reference to the Recorder's*
" *office. There is no reported case which we find*
" *where silence could be urged as an estoppel by*
" *one acquainted with his own rights, or who had*
" *the means of ascertaining.* (*Alexander* vs. *Kerr*
" 2 Rawle, 90; *Crest* vs. *Jack*, 3 Watts, 239;
" *Carr* vs. *Wallace*, 7 Watts, 400; *Robinson* vs.
" *Justin*, 2 Penn., 22.)

" If a party, with the knowledge of, or having
" the means of ascertaining, the title to real prop-
" erty, proceeds to occupy said property and ex-
" pend his money in improvements, he is not en-
" titled to any relief in law or equity. He has no
" right to complain, because he has not been mis-
" led by any one, and if mistaken, it has been his
" own fault. The title to real property carries
" with it all the improvements. The owner has
" a right to the exclusive use of his property,
" without molestation from any one. Whoever
" interferes with its use and enjoyment by him, is
" a trespasser; and the interference is none the
" less a trespass, because followed by the erection
" of structures which are termed improvements.
" The instruction would permit one man to strip
" another of his estate under the pretext of hav-

" ing improved it, unless notified of the title, al-
" though that title was notorious, or could be easily
" ascertained."

In the late case of *Penn. Lead Cos.' Appeal*, XI Reporter, 247–8, the Court say:

" When justice is properly administered, rights
" are never measured by their mere money value,
" neither are wrongs tolerated because it may be
" to the advantage of the powerful to impose
" upon the weak. Whether it be the great cor-
" poration with its lead works, or the mechanic
" with his tin shop, the rule is the same, 'so use
" ' your own so not to injure others.' Moreover,
" there is after all one underlying principle which
" influences both, and that is private gain. There-
" fore to neither is the general community under
" any special obligation, and there is no good
" reason why the rules of law should be relaxed in
" the one case rather than the other. Again, we
" cannot but regard this company as unfortunate
" in the selection of a place for the erection of
" its works. To undertake the business of lead
" melting in the midst of a rich suburban valley,
" occupied by farms and country resid ences, was,
" to say the least of it, not very prudent. A sit-
" uation like that selected by the defendant ought
" at the outstart to have been regarded as im-
" proper, since common knowledge and prudence
" should have informed the managers that sooner
" or later injury would result to the adjacent
" property.

" But it is insisted that the plaintiff has no
" equity as against this company, because he gave

" no notice before or at the time of the erection of
" its works. But of what was he to give notice ?
" The master has found that he knew nothing of
" lead words and their probable effect on adjacent
" lands; he could not, therefore, notify it of that
" of which he was ignorant. One would suppose
" that the managers of the corporation would be
" fully posted. If they were, if they knew what
" the effect would be upon the surrounding prop-
" erty, then they acted with knowledge wanton-
" ly, and notice to them was unnecessary; but
" if they were ignorant; if they knew not the
" consequences which would fall on the business
" in which the company was about to engage,
" then they ask too much of the plaintiff when
" they require of him a knowledge of their own
" business which they themselves did not possess."

It appears in this case that all of the patents under which the plaintiffs' claim title to the land on Buena Vista Slough were recorded in the Recorder's office of Kern County immediately after they were issued. (See T. 2,fols. 32, 40,49 and 59.) And it appears that the deed from Thomas Baker, Julius Chester, H. P. Livermore, and John H. Redington, to the plaintiffs, Henry Miller and Charles Lux, was recorded in the County Recorder's office, on the 13th day of June, 1874 (folio 89); or about one year before the Calloway notice was posted on the banks of the Kern River.

In the case of *Shamleffer* vs. *Peerless M. Co.*, 18 Kansas, 33, the Court held that the party who stands by and sees another erect improvements on the stream above him, and diverting the water, is not estopped questioning that diversion so long as it appears there was no concealment, or any fact known to such party and not known to the party diverting the water. Every one is presumed to know the law. The party must know that he could not divert any portion of the stream from its natural channel without the consent of the riparian owners prejudiced thereby. In this case the Court also says that the right to the flow of water in its natural course is not an easement, but a part and parcel of the inheritance, and passes with it.

So in the case of *Merrill* vs. *St. Anthony F. W. P. Company*, 26 Minn., 222(37 American Reports, 399). The Court held that where a party was authorized by the Legislature to construct, dams and mills on a river, and did so, the lower riparian owner not objecting, it was held:

First—That under such Act the party could not dam the river so as to divert the water from the lower riparian owner, and to his injury.

Second—That such a case contained no element of estoppel. The defendant acted with full knowledge of the facts, and he must be presumed to know the law controlling the rights of the parties, and if he is mistaken in his rights he must show that he has been led to such mistake by the plaintiff.

In the case of *Burdan* vs. *Stein*, 27 Alabama, 104, it was held:

1st. That the party need not establish his right at law before proceeding in equity to enjoin the diversion of water.

2nd. That laches on the part of the plaintiff will not prevent his obtaining an injunction if his right is clear, and the injury of such a character as would entitle him to call upon the Court in Equity to interfere, and the Court say:

"We consider then that the right of the appel-
" lant is clear; that by the evidence he has estab-
" lished, his right as a riparian proprietor to the
" use of the water in its accustomed flow, by
" proving that he is the owner of land on both
" sides of the creek, and that Stein has diverted
" the water in pipes to the city of Mobile, and
" this act, though not attended with actual dam-
" age, if done in violation of a right, was held by
" Judge Storey, in *Webb* vs. *Portland Manufac-*
" *turing Company*, (3 Sumner, R. 189), to be a
" a sufficient ground to warrant the interference
" of a Court of Equity by way of injunction.

"*Burdan* vs. *Stein*, 27 Alabama, 115."

Mr. Pomeroy, in his work recently issued on Equity Jurisprudence, says: "This effect of delay
" is subject to important limitation, for it is prop-
" erly confined to claims for purely equitable rem-
" edies, to which the plaintiff has no strict legal
" right. Where an injunction is asked in the

" support of a strict legal right, the party is enti-
" tled to it, if his legal right is established."

" Mere delay and acquiescence will not, therefore,
" defeat the remedy, unless it has been abandoned
so long as to defeat the right itself.

2 Pomeroy, E. Q. Jur,, Section 887.

In this State it has been repeatedly held that the Statute of Limitations " is applicable alike to
" all causes of action, to a cause of action in equity
" as well as one of law."

Boyd vs. *Blankman*, 29 Cal., 41.
Angel on Limitation, Section 25.
Dugan vs. *Silby*, 3 Gill. (S. C.), 138; also
Corning vs. *Troy Iron and Nail Factory*, 40 N. Y., 205, 206, and 207.

The facts found by the sixty-third and sixty-fourth findings are not sufficient to constitute an equitable estoppel.

Brant vs. *Virginia Coal and Iron Co.*, § 1962, C. C. P., Sub. 3, 93 U. S., 335.
Biddle Boggs vs. *Merced Mining Co.*, 14 Cal., 368.
Davis vs. *Davis*, 26 Cal., 23.
Gray vs. *Bartlett*, 20 Pick., 193.
Maine B. F. Co. vs. *Boston T. Co.*, 37 Cal., 50.
Green vs. *Prettyman*, 17 Cal., 401.

Even had the plaintiffs consented to and aided in the construction of the Calloway Canal, such facts would not have created an estoppel *in pais*.

Brown vs. *Bowen*, 30 N. Y., 542–3.

The sixty-third finding finds, as a fact, that plaintiffs had notice of all the acts of Calloway and others taken, to appropriate the water of Kern River, from 1875 to the commencement of this suit. But, by finding 2, it is found that "*Plain-*" *tiffs had not prior to the issuance of said patents*" (the first was issued January 18, 1876, first finding, T. V., fol. 331) "*any right, ttitle, interest,* "*claim, demand, or possession, legal or equitable,* "*of, in, or to, said land, or any part thereof.*" Yet, the acts, or rather the silence of plaintiffs in 1875, is now put forward as estopping them from asserting rights which they are found to have acquired a year later. Silence in 1875 could hardly estop plaintiffs from asserting a title acquired in 1876. But, then, consistency is not the prevailing virtue in the eighty findings signed in this case.

Donaldson vs. *Hibner*, 55 Mo., 492.

The Kern Valley Canal.

The rights of Kern Valley Canal cannot be litigated in this case, not being a party to this suit, nor can its acts or the acts of the plaintiffs in connection with it aid the defendant, or justify it in diverting water from Kern River; and besides, we have the testimony of Mr. Wible, who superintended the construction of the Kern Valley Canal, that this canal does not deprive Buena Vista Slough of the waters of Kern River, but is simply built for the purpose of more conveniently handling those waters. He testifies :

"Q. What effect, if any, has the construction "of those canals in preventing the water from "running down Buena Vista Slough?

"*Mr. McAllister*—You mean of this Kern "Valley Water Company's Canal?

"*Mr. Houghton*—Yes, sir.

"*The Witness*—A. Well, I take water out and "and turn it in, just as I see proper.

"*Q. What effect has it upon the escape of the "water down Buena Vista Slough?*

"*A. It dou't interfere at all.*

"*Q. Can you take out any water in that canal "that does not eventually go back to the slough?*

"*A. No, sir.*

"Q. Where is the first gate or weir through "which water runs from that canal?

"A. It is right in the bed of one of the chan- "nels of Buena Vista Slough, on Section 15. It "is right close to the head of the canal. One "corner of that gate is right in the old slough— "Buena Vista Slough. Buena Vista Slough "forks and runs around a little island. One "branch I closed up, and built the head-gate "right near to that one.

"Q. Then the water, instead of running "through two branches, runs through a head- "gate that is built in one of them?

"A. Yes, sir.

"Q. How does the bed of that gate compare "with the bed of the slough before you disturbed "it?

"A. Well, it is lower—lower than the bed of "the slough was.

"Q. How many gates are there from which "you can let water out along that canal—how "many gates in all?

"A. Six, I believe.

(T. I., fol. 1798–1801.)

He then goes on and locates all of the six gates, and says that no matter which of the gates the water runs out of, it runs back into Buena Vista Slough (T. II. fols. 1801-6.)

Mr. Crocker testifies that he and Miller and Lux were stockholders in this Kern Valley Water Company; that they paid assessments to that company, and that each acre of their swamp land was assessed for the benefit and aid of its improvement. He fully testifies to the interest of Lux and Miller and himself in the Kern Valley Water Company and its canal. (T. II. fols. 624-6.) When he was first on the stand, he denied that he had ever been a Trustee of Swamp Land District 121. The Kern Valley Canal, as testified by Wible, was commenced by Swamp Land District 121, and was thereafter continued by the Kern Valley Company, but subsequently Mr. Crocker, after refreshing his recollection, took the stand to correct his testimony. (T. II. fols. 907-8).

Mr. Crocker also testifies, in the same way as Mr. Wible as to the waters of the Kern Valley Canal, all going back into Buena Vista Slough, and he says, that the real purpose of that canal was to distribute those waters in a better way, and with

greater economy, for the benefit of plaintiffs and other owners of swamp land along Buena Vista Slough.

" Q. Your attention was called to the canal " that has been constructed along the border of " swamp land running down through the three " townships. I understood you to say that in times " a portion of the water running through Buena " Vista Slough has been thrown in that canal ?

" A. Yes, sir ; after turning it in, it follows " down that canal.

" Q. What has become of that water after it " has been turned into that canal ?

" A. At the present time it follows the canal " for 4 or 5 miles below Dover's Camp, " and then passes out of a canal through a " break into the swamp, and back into the " Buena Vista Slough. I suppose that break is " down about 20 miles; I should judge so. I " should think the canal was 28 miles long. I am " not positive about the length of it. I have seen " water running the whole length of that canal.

" Q. Providing the water was running in that " manner, what became of it after it had gone " the whole length of the canal ?

" A. It passes out of the canal, and into " Buena Vista Slough, and ran down Buena Vista " Slough.

" Q. Provided the water was running the " whole length of the canal, where would it dis- " charge itself, into Buena Vista Slough ? I " think the larger map will show you.

" A.—[Examining the map 1.] It would dis-
" charge due west of Goose Lake, and from
" there it would pass on from Buena Vista Slough
" to Tulare Lake.

" Q. *Then, turning the water from Buena*
" *Vista Slough into that canal, and running it the*
" *length of it, and letting it run out, would in no*
" *manner interfere with the water of Buena Vista*
" *Slough running through the portion of land de-*
" *scribed in the complaint, that lies close to Tulare*
" *Lake?*

" A. *No, sir.*

" Q. It would all have to run through that
" channel eventually?

" A. If the water was all turned down that
" canal it would make a greater supply of water.

" Q. Why would it make a greater supply of
" water?

" A. Because there would be less evaporation,
" and less loss of water. It would also run in a
" straight channel.

" Q. And it would all continue on in the same
" Buena Vista channel after it was turned in that
" it would if it had run down the natural channel?

" A. Yes, sir. At present the water is turned
" out of the canal at the point down about 20
" miles.

" Q. How many gates are there in that canal,
" where the water can be dropped from the canal
" back into Buena Vista Slough?

" A. Five or six, I should judge. I am not
" positive; may be more.

" Q. Then, if you should turn the water into " that canal, and let it out at any of these gates, " or let it out at 2 or 3 gates, where would it run to?

" A. It would run back into the Slough.

" Q. No matter where it was turned out; it " would run back into Buena Vista Slough ?

" A. At any point that I know of.

" Q. *Is there any other escape for the water by " turning it out of that canal, except into Buena " Vista Slough ?*

" A. *No. sir.*

(T. II. fols. 703-8).

License by Plaintiff to Kern Valley Water Company.

The counsel for defendant claim that there is one point that was conclusive: that the fact that we had stood by and seen the Kern Valley Water Company build a levee over the east fork of the slough, and put a head-gate in the west fork, and build a canal, and take, as it were, control of that slough at a point south of our property, and before the flow of the slough would reach our lands; that, by so doing, by that license, that parol license, we had extinguished all our right to the water. Well, now, in the first place, let us see what the pleadings in this case are: We aver our title, we aver the existence of this stream of water flowing through our lands, to which we had this established title; we aver the diversion by these defendants, and we ask for an injunction for this disturbance of our right.

And what do they reply? They reply, denying our title, denying the existence of our watercourse, denying any diversion upon their part, denying any injury, and denying any disturbance. Do they plead any license? What is the license? What is the plea of license? It is a plea in the nature of a confession and avoidance. It confesses the right of the plaintiff and avoids it by the plea of license. If this license exists, as they assert, to whom have we given that license? To them? Is there in this case, or in any other case, the right of the defendant to say to the plaintiff: "I am in-
" juring your property, I am diverting your water;
" but you have given a license to John Jones that
" he may divert it, and because you have given a
" license to John Jones, that he may divert it, the
" license which you have given to John Jones,
" and which I have not pleaded and with which
" I have no possible connection, that constitutes
" my defense in this case."

The authorities are decisive that, in the first place, a license has to be pleaded, both in law and in equity; and in the second place, that a license to one man cannot be used to avail another man.

This defendant has no connection with that license. Our rights are not extinguished by that license. The precise terms of the arrangement between the Kern Valley Water Company and these plaintiffs, is something with which these defendants have nothing to do. They can set up no such *jus tertii;* that belongs exclusively to the Kern Valley Water Company. In all the cases cited by the learned counsel from Washburn on

Easements, the contest and litigation was between the licensor and licensee, as if this was a litigation between ourselves and the Kern Valley Water Company. But this is no such litigation, and the defendants cannot plead the *jus tertii.* That question has been adjudicated time and time again in this State, in actions of ejectment and in various other actions, that the defendant cannot come into Court and say, "You may "have a good title as against me, but you have "not got a good title as against the United "States," for, as was said in the case of *McDonald* vs. *Badger*, 23 Cal., 389, when Badger had made an assignment of all his property, under an insolvent law to his assignee, and his property was sold under execution, and when the judgment purchaser under that sale came with his Sheriff's deed to turn Badger out of the property so sold, Badger said: 'Oh, I made an assignment antece-"dent to this sale, and all my property passed to "my assignee."

The Court said: "You have got nothing to do "with that assignment. You have got no title as "against this party. But, if any subsequent liti-"gation grows up, let that assignee and this judg-"ment purchaser fight it out. Mr. Badger can-"not avail himself of this at all. It is a *jus tertii* "and we don't allow that to be set up to the pre-"judice of the plaintiff."

And in support of this proposition we refer to the following authorities:

Ferrea vs. *Knipe*, 28 Cal., 340.
Wood vs. *Wand*, 3 W. H. & G., 772.

Crump vs. *Lambert*, L. R., 2 Ch., App., Eq. Cas., 409.
Crossley vs. *Lightowler*, L. R., 2 Ch., App., 478.
Omerod vs. *Todmorden Mill Co.* (*L. R.*), 11 Q. B. D., 155.
Varick vs. *Smith*, 5 Paige, 148.

In the face of the foregoing facts and authorities, it is not a little surprising that we are able to copy the following from the Conclusions of Law upon which the Judge of the Superior Court based his judgment in favor of the defendant in this case:

"That, by the acts and acquiescence of the "plaintiffs, as hereinbefore found, in the do-"ings of the Kern Valley Water Company, "all claims and causes of action growing out "of the diversion by the defendant, were be-"fore and at the time of the commencement "of this action, lost and destroyed, and all "riparian rights, if any plaintiffs had, there-"by extinguished."

T. V., fol. 805.

Additional authorities on questions to a what constitutes a watercourse.

In addition to the cases heretofore cited by us in support of our position that Buena Vista Slough, running as it does through a body of

swamp land, is and will be considered by this Court a watercourse, and that the plaintiffs who own land on this slough are entitled to all the rights of riparian owners, we refer the Court to the following cases, decided by our Supreme Court:

Ogburn vs. *Connor*, 46 Cal,, 349.

The facts as to the character of the slough, which the Court held in that case, gave parties owning land on it all the rights of riparian owners on a natural stream of water or watercourse, are clearly stated by Mr. Justice Belcher in his opinion.

" The plaintiff was the owner of a farm adjoin-
" ing and lying directly north of a farmed owned
" by the defendant. A portion of the defendant's
" land was lower than the land of plaintiff, and
" had extending through it a natural depression.
" *There was no stream or watercourse upon the*
" *plaintiff's land*, but the surface water, falling
" upon it in times of heavy rains, and flowing
" upon it from other adjoining and still higher
" lands, was accustomed, before its flow was ob-
" structed by the defendant, to pass off through
" the depression named over the land of the de-
" fendant into a large natural watercourse known
" as as Willow Slough.

" In 1863, and while the plaintiffs' land was un-
" occupied public land of the United States, the
" defendant built along the north line of his land
" a ditch fence for the protection of his land and
" growing crops. This ditch fence consisted of

" a ditch and embankment with some rails or
" boards on top of the embankment, and was
" sufficient to partially obstruct the water which
" fell or collected upon the plaintiff's land, from
" flowing over the land of the defendant as it had
" been before that time accustomed to do. In
" 1869, the defendant strengthened and enlarged
" the embankment so as to form a more complete
" barrier to the passage of the water referred to.
" In December, 1871, very heavy and copious
" rains fell, and a large quantity of water there-
" from collected upon the land of the plaintiff,
" but its passage off from the land was obstructed
" by the embankment erected by the defendant,
" and thereby a large part of the plaintiff' land
" was inundated, and his growing crop of wheat
" injured to the amount of $500. * * *

" The question presented for decision is im-
" portant, and not free from difficulty. In Massa-
" chusetts the Courts have steadily adhered to
" the rule followed by the Court below. In that
" State, it is said, that 'the obstruction of sur-
" 'face water, or an alteration in the flow of it,
" 'affords no cause of action in behalf of a per-
" 'son who may suffer loss or detriment there-
" 'from against one who does no act inconsistent
" 'with the due exercise of dominion over his
" 'own soil.' (*Gannon* vs. *Gargadon*, 10 Allen,
" 110; *Parks* vs. *Newburyport*, 10 Graff., 28;
" *Ashley* vs. *Wolcott*, 11 Cush., 192.) That rule
" has not, however, been generally followed in the
" other States, except inso far as it applys to town
" or city lots." (*Martin* vs. *Piddle*, 26 Penn. St.,

" 415; *Ranffman* vs. *Griesemer*, 26 Penn. St., 407;
" *Martin* vs. *Jett*, 12 La., 502; *Lattimore* vs.
" *Davis*, 14 La., 161; *Delahousaye* vs. *Judice*, 13
" La. An., 587; *Butler* vs. *Peck*, 16 Ohio St.,
" 334; *Laumier* vs. *Francis*, 23 Mo., 181; *Beard*
" vs. *Murphy*, 37 Vt. St., 99; *Gillham* vs. *Madi-*
" *son Railroad Co.*, 49 Ill., 484; *Gormley* vs. *San-*
" *ford*, 52 Ill., 158; *Billows* vs. *Sackett*, 15 Barb.,
" 102.)

" The prevailing doctrine appears to be that
" when two fields are adjacent, and one is lower
" than the other, the owner of the upper field has
" a natural easement to have the water that falls
" upon his land flow off from the same upon the
" field below which is charged with a correspond-
" ing servitude."

" In *Martin* vs. *Riddle* the Court said: 'When
" ' two fields adjoin, and one is lower than the
" ' other, the lower must necessarily be subject to
" ' all the natural flow of water from the upper
" ' one. The inconvenience arises from its posi-
" ' tion, and is usually more than compensated by
" ' other circumstances. Hence the owner of the
" ' lower ground has no right to erect embank-
" ' ments whereby the natural flow of the water
" ' from the upper ground shall be stopped; nor
" ' has the owner of the upper ground a right to
" ' make any excavations, or drains, by which the
" ' flow of water is diverted from its natural
" ' channel, and a new channel made on the lower
" ' ground; nor can he collect into one channel
" ' waters usually flowing off into his neighbor's

" ' fields by several channels, and thus increase
" ' the rush upon the lower fields.'

" In *Gillham* vs. *The Madison County Rail-*
" *road Company*, the Supreme Court of Illinois
" said that the doctrine of *Martin* vs. *Riddle* was
" the doctrine of the Civil Law, and has found
" favor in almost all the Common Law Courts of
" this country and of England.

" In *Butler* vs. *Peck* the Supreme Court of
" Ohio said: ' The principle seems to be estab-
" ' lished and indisputable, that when two parcels
" ' of land belonging to different owners lie ad-
" ' jacent to each other, and one parcel lies lower
" ' than the other, the lower one owes a servitude
" ' tude to the upper to receive the water which
" ' naturally runs from it, provided the industry of
" ' man has not been used to create the servitude;
" ' or, in other words, more familiar to the stu-
" ' dents of the Common Law, the owner of the
" ' upper parcel land has a natural easement in
" ' the lower parcel to the extent of the natural
" ' flow of water from the upper parcel to and
" ' upon the lower.'

" As the result of these cases upon the subject
" Mr. Washburn, in his excellent work on ease-
" ments and servitudes, states the rule thus: ' It
" ' may be stated as a general principle that when
" ' the situation of two adjoining fields is such
" ' that the water falling or collected by melting
" ' snows, and the like, upon one, naturally de-
" ' scends upon the other, it must be suffered by
" ' the lower one to be discharged upon his land,
" ' if desired by the owner of the upper field; but

" ' the latter cannot, by artificial trenches, or
" ' otherwise, cause the natural mode of its being
" ' discharged to be changed to the injury of the
" ' lower field, as by conducting it by new chan-
" ' nels in unusual quantities on the particular
" ' parts of the lower fiield.' (2d Ed., p. 427.)

" Substantialiy the same question was before
" this Court in *Castro* vs. *Barley*, No. 2023, de-
" cided at the October Term, 1869, and the judg-
" ment which was for the plaintiff in the Court
" below was affirmed here.

" We are satisfied that the rule generally pre-
" vailing in this country is the better rule, and
" that it, and not the rule which obtains in Massa-
" chusetts, should have been followed by the
" Court below." * * * *

" It is further urged that thc plaintiff ought not
" be permitted to recover because the defendant
" constructed his embankment before the plaintiff
" purchased his land of the Government, or had
" settled thereon. The argument is not sound.
" While the upper portion belonged to the Gov-
" ernment, the defendant could gain no prescrip-
" tive right to obstruct the natural flow of water
" therefrom. When the plaintiff pucrhased he
" acquired all the rights which the Government
" had in the land at the time of its sale; one of
" these rights, as we have seen, was the right to
" have all surface water collected upon it flow off
" freely and without obstruction upon adjoining
" lower lands."

It will be noticed that several of the cases cited by counsel for defendant, on page 138 of the Argument and Authorities, and relied on by them, are the same cases cited in *Ogburn* vs. *Connor*, and which the Supreme Court said laid down a rule which it would not follow.

The case referred to in the opinion, *Castro* vs. *Bailey*, No. 2023, is not reported. We give a copy of the opinion taken from the "Bulletin," published at the time the case was decided :

Castro vs. *Bailey*.

"The gravamen of this action is that the de-
" fendants erected a dam whereby the waters,
" which, during freshets, found their way into the
" bay across the lands of the defendant, were di-
" verted from their natural and accustomed course
" and were thereby made to flow across and upon
" the plaintiff's land, whereby his growing crops
" were injured, and the land rendered partially
" unfit for cultivation. In the complaint the dam
" is alleged to have been erected across a brook
" or stream called or known by several different
" names ; and the defendants claim that the proof
" shows that there was no brook or stream at the
" particular spot where the dam was erected ; and
" that the waters, during freshets, spread out at
" that point and dispersed themselves over
" Bailey's land greatly to his detriment ; and that
" the dam was simply intended, and only had the
" effect, to concentrate the water into an old
" channel so as to protect Bailey's land from
" overflow." * * * "Nor is it material

" whether the effect of the dam was to divert a
" running stream from its natural channel, or only
" to collect into one body the waters which had
" been accustomed to disperse themselves over
" Bailey's land in finding an outlet to the bay. In
" either event the damage to the plaintiff was the
" same. If the water, during freshets, naturally
" spread over Bailey's land, he had no right to
" relieve himself of this inconvenience at the ex-
" pense of the plaintiffs, and by erecting an arti-
" ficial barrier so to accumulate and divert the
" water as to overflow the plaintiff's land, which
" would otherwise have been free from inundation
" if the water had been left to find its accustomed
" outlet to the bay."

We also refer the Court to a case recently decided in the Court of Appeals in England, where this whole question is reviewed, three judges writing opinions in the case. (*Ormerod* vs. *Todmorden Mill Co.*, Law Reports, 11 Q. B. D., 155, also reported in Albany Law Journal of Nov. 4, 1883.)

It is claimed by counsel for defendant that the banks or sides of Buena Vista Slough are the high land on each side of the swamp land, and, therefore, the plaintiffs cannot recover, because they are not the owners of such land, and the lower Court bases its judgment on this proposition.

The second conclusion of law reads:

" *That even if the waters in question could be*
" *deemed a watercourse, extending from the Sierra*
" *Nevada Mountains to Tulare Lake and below,*
" *this action cannot be maintained, because it does*

" not appear that the plaintiffs' lands embrace what " would then have to be considered the banks or " sides of said supposed watereourse or any part of " said banks or sides.".

That the margin of swamp land, or the segregation line established by the Government dividing the high land from swamp and overflowed land, is the bank or sides of the watercourse running through and forming such swamp and overflowed land is certainly a remarkable proposition. If this be so,then the bank of the Sacramento River is the margin of the swamp land that is flooded in the Spring when the melting snows cause the river to overflow for miles on each side. The same must hold good as to the San Joaquin River also, and its "bank" would be the margin of swamp land formed from its overflow. If this be so, our California rivers should be classed as the largest in the United States, unless, perhaps, the same rule is applied to the feature of water, and its bank be considered the line marked by the overflow in time of extraordinary Spring freshets.

In the Spring of 1880, the Mississippi River from Cairo to the gulf, 1100 miles, had an average width of 20 miles, and an average depth of 10 feet; and nearly every Spring it overflows its banks, and forms a sheet of water miles in width. Still, we hardly think the line of this usual overflow would be considered the "banks" of the Mississippi.

Where is the "bank" of the Ohio River to-day (Feb. 11, 1884), when it is flooding all the cities

and towns along its course and the surrounding country for miles ?

The proposition is one too absurd to merit serious consideration, and had not the Judge of the Superior Court carried it into his conclusions of law, we should not have noticed it.

But we are not without authorities on this question.

In the case of *Howard* vs. *Ingersoll*, 13 How., U. S. 542, the question was presented as to what line was dividing the States of Georgia and Alabama.

The State of Georgia ceded to the United States certain territory. The line in dispute was described as beginning at a certain point on the West line of the Chattahoochee River, and along the West bank of the said river to a certain creek, and the question presented was what was meant by the West bank of the Chatahoochee River.

The Court gives the facts as follows :

" From the bill of exceptions, in the first case, " it appears that immediately at the plaintiff's lands " and lots, the banks of the river are from fifteen " to twenty feet high on both sides, abrupt above " and below for considerable distances. The high " banks, however, do not extend down to the " waters' edge at ordinary low water. The bed " of the river at this point is about two hundred " yards wide from bank to bank ; by the bed is " meant the space between these abrupt and high " banks ; and is composed of rocks and slues " among the rocks from one side to the other. Or- " dinary low water and extreme low water to-

" gether prevail for about two thirds of the year, " during which time the river is confined to a " channel about thirty yards wide, leaving the bed " of the river as above described, exposed on each " side of this channel from thirty to sixty yards. " Immediately under the western abrupt and high " bank, and within the latitude of the north and " south boundary line of plaintiff's land, those " lines being drawn down to the water's edge, " and in the bed of the river, as above described, " east of the western abrupt and high bank, the " plaintiff erected a mill previous to 1842, and " continued in the possession and use of it until " overflowed by defendant's dam. The place on " which the mill is, is covered with water in or- " dinary high water, but is bare and dry in ordi- " any low water." (Page 414.)

The Court then say:

" When the commissioners used the words bank " and river, they did so in the popular sense of " both. When banks of rivers were spoken of, " those boundaries were meant which contain " their waters at their highest flow, and in that " condition they make what is called the bed of " the river. They knew that rivers have banks, " shores, water, and a bed, and that the outer line " on the bed of a river, on either side of it, may " be distinguished upon every stage of its water, " high or low, at its highest or lowest current. *It* " *neither takes in overflowed land beyond the bank,* " *nor iucludes swamps or low grounds liable to be* " *overflowed, but reclaimable for meadows or agri-* " *culture; or, which being too low for reclamation,*

"*though not always covered with water, may be*
"*used for cattle to range upon, as natural or unin-*
"*closed pasture.*"

See Gould on Waters, Sec. 45.
Howard vs. *Ingersoll*, 13 How., 415–16.

It appears by the evidence in this case that, after the usual Spring floods receded, the water was confined to the channels, and that about three-fourths of the land could be travelled over by man and beast and used for grazing stock. (Testimony C. W. Clarke, T. II., f. 1178–9.) H. M. Epperly says four-fifths of it. (T. II., f. 2225.)

Authorities cited by counsel for defendant on the point made by them that your Honor can disregard the Common Law rule governing water rights, if in your opinion such rule is not adopted to the physical condition and want of California.

The authorities cited by counsel in support of this proposition are quite numerous, but there is one very peculiar feature about them all, and that is that they do not decide anything of the kind.

They first quote at length from a dissenting opinion of Mr. Justice Bronson, but they do not mention the fact that it is a dissenting opinion.

On pages 99 and 100 of defendant's cause, argument and authorities—last filed—we find the following:

"I think no doctrine better settled than that "such portions of the law of England as are not "adopted to our condition form no part of the "law of this State. This exception includes not "only such laws as are inconsistent with the spirit "of our institutions, but such as were framed "with special reference to the physical condition "of a country differing widely from our own. It "is contrary to the spirit of the Common Law "itself to apply a rule founded on a particular "reason to a case were that reason utterly fails. "*Cessante ratione legis essat ipsa lex.*

"20 Wend., 159."

All of the above quotation is copied from a dssenting opinion of Bronson, J., in which no other Judge concurred.

They next quote from an opinion of Mr. Senator Beardsley in the case of *Canal Commissioners* vs. *The People*, 5 Wend., 63.

But they failed to give the opinion of Mr. Senator Beardsley, when the case was again before the same Court, when he says:

"In expressing the opinion when this cause "was here before, that the Common Law had "never been adopted as applicable to our large "fresh water rivers, I was not unmindful of the "fact, that a contrary opinion had been held by "the judicial authorities of this State. Nor did I "adopt it without great diffidence of opinion and "distrust of my own judgment, and I ought to "say, without doubts, too, whether it was not in-"correct. *Not being a turning-point in the case,*

" *I did not intend to put forward that opinion as* " *an authority (even on my own part); and I* " *should feel at liberty now to depart from, and* " *even to repudiate it, could I be satisfied that it is* " *wrong.*"

The Canal Appraisers vs. *The People*, 17 Wend., 613.

And they also fail to give the following note that appears in connection with the case, on p. 424, 5 Wend.

" This case in itself, as simply presenting the question of the " construction of a grant, would not have justified the occupy- " ing the space it does in these reports; but involving a princi- " ple of immense magnitude in its results, both as it regards " the *interests of individuals* and the *rights of the public*, as to " the application of the rule of the common law to *grants* " *bounded on rivers above tide water*, it has been deemed that a " more acceptable service could not be rendered than by giv- " ing a full report of the case, notwithstanding its length. The " principles on this point advanced by the members of the " Court cannot, however, be considered as established by the " determination of the Court, *as the decision of the case wholly* " *proceeded on the ground that the relator had failed to show title* " *to the premises injured.*"

The last part of this note is taken from the decision of Davies, J., in *The Canal, etc.* vs. *The People, etc.*, a case cited by counsel for defendant.

On p. 99, they quote from *Parker* vs. *Foote*, 19 Wend., 318, as follows:

" It cannot be necessary to cite cases to prove " that those portions of the Common Law of " England which are hostile to the spirit of our

" institutions, or which are not adapted to the ex-
" isting state of things in this country form no part
" of our law."

But they fail to add the next two lines which have quite an important bearing on the subject, *i. e.*, "*And, besides, it would be difficult to prove* " *that the rule in question was known to the Com-* " *mon Law prior to the 19th day of April, 1775.*" (The date referred to in the Constitution of N. Y. adopting the Common Law.)

They quote from decisions cited by them as they do from the evidence of witnesses—giving such portions of a decision as works in their favor, and omitting the balance which would make the cases an authority in favor of plaintiff. As illustrations of this manner of quoting from decisions, we refer to the following cases :

On this same point, they refer to the case of *Waters* vs. *Moss*, 12 Cal., 538, as follows :

"So, the Common Law rule in regard to fencing
" in one's own cattle was *never in force* in California,
" being repugnant to our customs and to our
" statutes."

But they failed to add the following :

" *Now the rule coutended for by the respondent,* " *and adopted by the Court below, is repugnant to* " *no less than three statutes passed by the session of* " *the Legislature at which the Common Law was* " *adopted,* to-wit, the law regulating *rodeos*, the act
" concerning marks and brands, and the act con-
" cerning lawful fences." (page 539.)

Nor do they call attention to the case of—

Logan vs. *Gedney*, 38 Cal., 581;

Where this same fence law question was before the Court, and the Court said:

"The rule of the Common Law of England, "that every man is bound to keep his beasts "within his own close, under the penalty of an-"swering in damages for all injuries resulting "from their being permitted to range at large, "never was the law in California.

"The first Legislature of the State, before "adopting the Common Law of England as the "rule of decision for the Courts of the State, "when not repugnant to or inconsistent with the "Constitution of the United States, or the Con-"stitution or laws of this State, had passed the "Act 'concerning lawful fences and animals tres-"'passing on premises lawfully enclosed.' (See "Statutes 1850, p. 131.) *This fence law of "March 30, 1850, is, by necessary implication, di-"rectly in conflict with and repugnant to the above "rule of the Common Law of England.* So, also, "is the Act of April 13, 1850, 'concerning marks "'and brands,' passed one day before the Act "adopting the Common Law as a rule of action. "(Statutes 1850, p. 214.) The same is true with "reference to the Act 'to regulate rodeos,' and "the Act 'concerning Judges of the Plains,' "passed at the second session of the Legislature, "1851, and many subsequent special Acts on the "subject of lawful fences, including the Act of "April 28, 1859, 'concerning lawful fences in the

" ' Counties of San Bernardino, Colusa, Shasta,
" ' Tehama and Placer,' which is still in force.
" (*Waters* vs. *Moss, Trustee, etc.*, 12 Cal., 535;
" *Comerford* vs. *Dupuy*, 17 Cal., 308; *Richmond*
" vs. *Sac. Val. R. R. Co.*, 18 Cal., 355.)"

Logan vs. *Gedney*, 38 Cal., 381.

They next quote (p. 101–2) at length from a case reported in 10 Ill. R., giving a full page from the report, and reading the opinion as we find it in counsel's brief it certainly seems to be a strong case in their favor, but their quotation stops at the word Illinois; but this follows:

" *But it is unnecessary to assume that ground in*
" *this case. The legislation upon this subject from*
" *the time when we were a part of the Indian Ter-*
" *ritory down to the last law contained iu the Re-*
" *vised Statutes, clearly show that the Legislature*
" *never supposed that this rule of Common Law*
" *prevailed in Illinois, or intended that it should.*"

Seeley vs. *Peters*, 10 Ill., 142–3.

The next case is from 31 Mich. (p. 102), and again as quoted by counsel is a case in their favor. But again they leave out the fact that the Legislature had settled the question and that the case went off on that point. The Court in that case say:

" *If there could be a reasonable doubt upon this*
" *point, it must be removed by the provisions of our*
" *Statute. These provisions are utterly irreconcil-*

" *able with the rules of Common Law, and are* " *made with reference to a contrary policy which* " *has existed here.*"

Vicksburg R. R. Co. vs. *Patten,* 31 Miss., 186–7.

The next case relied on is from 3 Ohio St. R. (p. 103.)

In this case the Court say:

That at the time the case was decided (1854) no act was in force in Ohio adopting the Common Law as the rule of decision, such Act having been repealed in 1802. And then says as in the last cases we have referred to.

" *Besides this the Legislature of the State has* " *put at rest all questions as to the existence of any* " *such rule in Ohio.*" And the Court then refers to numerous acts of the Legislature.

Kerwhacker vs. *C. C., &c.,* 3 Ohio St., 180.

Counsel next refer to cases in 2 Binney, and 42. Penn. St. (p. 103). And again the Court say, that the Legislature had disposed of the question. The Court say:

" *On that branch of the argument it is sufficient* " *to say that by an Act of the Legislature, passed* " *March 9, 1771, the Susquehanna River was de-* " *clared a highway.*"

Carson vs. *Blazer,* 2 Binney, 485.

And the same question was presented in the case in 42 Penn. St., and it was decided on the authority of *Carson* vs. *Blazer.*

Counsel refer to a second case in Ohio (p. 106), and again the Supreme Court say the question has been settled by the Legislature.

The Court say:

"*The Court, however, did not deem it necessary* "*to decide this case upon the principles of the* "*Common Law as applicable to the condition and* "*state of society, as we are of opinion that at the* "*time when the exchange relied upon in this case* "*took place that there were statutory provisions in* "*force regulating the conveyance of real estate.*"

Lessees, etc., Coats, 1 Ohio, 245.

Counsel refer also (p. 103) to the case of *People* vs. *Canal*, etc., 33 N. Y., as they say: "For an "elaborate presentation of the reasons why the "doctrine *ad medium filum* does not apply to large "rivers, lakes, etc., in this country, *because the* "*Common Law is inapplicable*," etc.

But again the Court say the question has been settled by the State Legislature.

On p. 475, the Court say, "The Legislature "had, in the most solemn manner, repudiated the "doctrine enunciated;" and after reviewing all the cases and acts of the State Legislature, the opinion closes with the following words: "I am "compelled, therefore, to regard the principles "there enunciated as the settled law of this State. "And I have the less hesitation in so doing, as I "believe that doctrine to be sound and impregna- "ble, *and in accordance with the expressed will of*

" *the Legislature*, and the better decisions of the
" Courts of this State, and of other States, and of
" the United States."

People vs. *Canal*, etc., 33 N. Y., 500.

They quote at length from two decisions of the United States Supreme Court in support of this same proposition, but again fail to give all of the opinion that is devoted to this point.

On page 105, will be found two references to *Van Ness* vs. *Packard*, 2 Pet., from which this Court would be led to think, should it not examine the opinion in the case that this very question had been presented to the Supreme Court of the United States, and decide in accordance with the views presented by defendant's counsel. But not so. Again counsel cut an opinion in two and leave out the following (referring to this very question):

" *At present, it is unnecessary to say more than*
" *that we give no opinion on this question. The*
" *case which has been argued at the bar may well*
" *be disposed of without any discussion of it.*"

Van Ness vs. *Packard*, 2 Pet., 145.

Counsel again quote from (p. 105) 8 Pet. R. in support of the same proposition, and in this case they take from the opinion here a line and there a line, omitting portions with nothing to indicate that they have done so, and again leave out the portion of the opinion that shows—

1st. That an Act of Congress had disposed of the question; and—

2d. That no such right at the Common Law had been recognized in England when the Colony of Pennsylvania was organized, or at the time the Common Law was brought to Pennsylvania.

Wheaton vs. *Donaldson*, 8 Pet., 660.

Here we have no less than eight cases cited by counsel for defendant, and in nearly all cases placing the portion of the opinion used by them in quotation marks, when the Court in all of such cases say in terms that they do not decide the point upon which they are cited as authorities in this case, and in six of them they say the question has been settled by legislative action.

But in doing this counsel have only adopted the same course they did when assuming to give the evidence of witnesses in their brief, and gave such portions as they thought worked in their favor, and leaving out that which immediately follow and reads against them, with nothing to indicate that they had not given all the evidence on the particular point.

The eight last cases referred to are all cited by counsel for defendant in support of the proposition that *in the absence* of legislation changing a Common Law rule, your Honors may disregard a rule established by Common Law, if in your opinion public policy demands it, or in case the Common Law rule in force is in your opinion not adapted to the physical conditions and wants of the State.

We can understand how counsel may in certain cases refer to decisions that may not be in point

on the proposition to support which they are cited, taking such citations from text books when they are referred to as supporting a general rule, and the exception contained in the cases are not noticed. But we cannot understand how it is that counsel can quote at length from six cases in support of a legal proposition which shows that they must have had the reports before them, and in every instance fail to discover that the Court in every case stated in plain and unmistakable language that they did not decide the point upon which they are cited as authority, for the reason that it had been settled by an Act of the Legislature.

This manner of presenting the authorities upon this vital point in this case is, we submit, not calculated to aid your Honors in any great degree in arriving at a correct decision in this case, nor is it calculated to inspire any great amount of confidence in the correctness of counsels statement as to what is the law on the other contested points in this case.

To recover in this case counsel for the defendant are forced to rely—

First. Upon cases which they claim decide that a party who first appropriated the water of a running stream and devotes it to some beneficial purposes, is entitled to it as against every one owning land on the stream below the point where the water is diverted.

But all of which have been decided by such Judges as Lord Denman and Story never to have

decided anything of the kind. Cases which have been cited and relied upon by persons claiming the right to appropriate water from a running stream in nearly every State in the Union, and in no single State except in Colorado have they ever been held to warrant any such doctrine as that contended for.

Second. Upon cases where in some parts of a long opinion, judges have referred to the claim made that a Court could disregard an established Common Law rule if in their judgment it was not adapted to the condition and state of things in their respective States. But when in such cases such Courts have invariably refused to hold that such was the law, but have held that the Courts must administer the law as it exists, and that changes in the laws from considerations of inconvenience or public necessity or hardship was a matter for the Legislature of the State to deal with.

Third. A few dissenting opinions.

Fourth. But they have found one line of authorities that they have to admit are in favor of plaintiff's position taken in this case; that the Common Law doctrine of water rights is that so clearly laid down by Chancellor Kent, Lord Denman and Judge Story, and the rule that has been received with favor in this State, and in every State in the Union except it be Colorado and possibly Louisiana.

The manner that counsel have of disposing of this line of authorities that are found in this State and Nevada is certainly a little peculiar to say the least.

They claim that every decision that has been rendered by the Courts of the Pacific States in favor of riparian rights has been in cases either misunderstood by the Court, or that the Judges who wrote the decision were like Judge Currey, who wrote the opinion in *Ferrea* vs. *Knipe*, not familiar with the law governing riparian rights (page 55, defendant's arguments and authorities). That all of the Judges of the Supreme Court of Nevada were like without guide or compass, and therefore decided in favor of riparian rights.

Counsel, in referring to the decision in *Ferrea* vs. *Knipe*, say, (page 55):

"We can see very well how Judge Currey, not "being familiar with the law in its application to "possessing rights and mining rights, put it "upon the riparian doctrine. He might just as "well, and a good deal better, have put it the "other way. Judges Sanderson and Sawyer, "who did know something about these things, re-"fused to take any part in the opinion Judge "Currey delivered."

The Judges who concurred in Judge Currey's opinion, and who must share in the compliment paid by counsel to Judge Currey, were Judges Oscar L. Shafter and A. L. Rhodes, two judges who were considered as knowing "something about these things;" in fact who have ever been looked upon by the bar of this State as among the ablest Judges who ever sat upon the bench of of our Supreme Court.

It must be with no little concern that counsel for defendant have read the numerous decisions

emanating from Judge Sawyer, or concurred in by him, since the decision was rendered in the Ferrea case, in which he has approved of the doctrine recognized by the Supreme Court in that case.

We have heretofore referred to the cases decided by Judge Sawyer, and concurred in by him, since he has held the position of United States Circuit Judge for the District of California. In all of them he recognizes the law of riparian rights, as correctly laid down in *Van Sickle* vs. *Haines*, and has never failed to refer to that case with approbation.

The only Judge who has in the opinion of counsel for defendant been fully equal to grappling this important question of riparian rights and deciding it properly, is Judge Helm of Colorado, who in the case of *Coffin* vs. *The Left Hand Ditch Co.*, decides, *First*, the Act of Congress of 1866 is retroactive, and cuts off the rights of a party in a stream of water running through his land, although the title to such land passed to him from the Government before the Act of 1866 was passed. *Second*, That the water can be taken from a watercourse by an appropritor, and carried across a divide, and used to irrigate land on a water shed other than that of the stream from which it is taken, although there may not be more than water enough in the stream to irrigate the land along the watercourse.

This Court must approve of both of these propositions, or defendants can not recover in this case.

We respectfully submit that neither of them are good law, and we call particular attention to the opinion in the case of *Coffin* vs. *Left Hand Ditch Co.*, and to the reasoning of Judge Helm and the rule adopted by him in construing statutes which were evidently passed to protect the rights of riparian owners. The decision is the direct result of the pressure of what the Judge who rendered it must have been considered "public necessity; but it is at the expense of overruling all known and well established rules relating to riparian rights and as well as certain well established rules giving count in the construction of statutes.

Adoption of the Common Law as the rule of decision in California.

When the Legislature of this State on April 13, 1850, passed the Act adopting the Common Law, which reads

"The Common Law of England, so far as it is "not repugnant to or inconsistent with the con-"stitution of the United States, or the constitu-"tion or laws of the State of California, shall be "the rule of decision in all the Courts of this "State."

What was it then that the Legislature then adopted as the rule of decision in California, in so far as it relates to this question.

Messrs. Flournoy, Mhoon & Flournoy assert in their brief (p. 3,) that California adopted the Common Law as understood and administrated on July 4, 1776.

And their whole brief as well as the last brief filed by defendant is predicated upon the correctness of this statement.

They devote, much time and space and the same is done by counsel who wrote the last brief filed, in trying to show that the common law rule relating to water rights prior to that date recognized appropriation only as a means of acquiring rights in the water of a running stream.

They claim that the doctrine as to the rights of riparian owners, found in Kent's Commentaries, published in 1826, and laid down by Judge Story, in *Tyler* vs. *Wilkinson*, in 1827, and by Lord Denman in *Mason* vs. *Hill*, in 1832 and again in 1833, is a new or modified Common Law doctrine, and one that the Legislature did not intend to adopt when it passed the Act of April 13, 1850, adopting *the Common Law of England*, as the rule of decision in the Courts of this State.

This certainly is a remarkable legal proposition.

Counsel do not make it very clear as to how they arrive at the fact that our Legislature had in their minds (it certainly is not found in the Act) that we are to accept as the rule of decision the Common Law of England, as understood and administered on the 4th of July, 1776.

The several States of the Union, when they have adopted the Common Law as the rule of decision in their respective States either by a provision contained in the State Constitution or by an Act of the Legislature, have fixed a time after which changes effected in the Common Law of England should have no effect in such State.

The Constitution of New York of 1877 provided (Art. XXXV.): "Such parts of the Com-
" mon Law of England, and of the Statute Law of
" England and Great Britain and of the Acts of
" the Legislature of the Colony of New York, as
" together, did form the law of the said colony on
" the nineteenth day of April, in the year of our
" Lord 1775, should be, and continue the law of
" the State, subject to such alterations and pro-
" visions as the Legislature of the State should
" from time to time, make concerning the same."

And every Constitution adopted in New York since 1777 has retained that date.

The Constitution of Massachusetts adopted—
" All the laws which have heretofore been adopted,
" used and approved in the province, colony or
" State of Massachusetts," etc.

Maryland and New Hampshire have about the same.

New Jersey adopted (Constitution of 1776)—
" The Common Law of England, as well as so
" much of the Statute Law *as has been* heretofore
" practised in this colony," etc.

Georgia "fixed May 14, 1776."

Vermont, "prior to 1860."

Illinois, "prior to 4th of James 1st."

Nearly all of the thirteen original States fixed about the time of the commencement of the Revolutionary war, or earlier, as the time the Common Law of England should be adopted, unaffected by any change made in England after that date. That is, they fixed a time when they

first had legislative bodies to make changes in in such laws when they were needed.

But California fixed no such remote date.

It adopted "The Common Law of England to "be the rule of decision in all the Courts of the "State," by the Act of the Legislature, passed April 13, 1860, and as it was *the Common Law of England,* as understood and administered on that day, and not at some indefinite and undefined date in the past.

In the absence of a date being fixed in a constitution, or an Act of the Legislature adopting the Common Law as the rule of decision, the date the Act is passed, or if not that date, then when the State has a Legislature to make changes in the law, will be considered the date when changes cannot be made by England that will effect the law in the new State.

Coburn vs. *Harney*, 18 Wis., 150.

An Act of Congress was passed in 1848 to give effect to the treaty between the United States and China. By such Act a Court was created, and given jurisdiction in suits between citizens of the United States and of China, and in the Act it was declared that such Court should be governed by the laws of the United States when applicable, and in case it was not applicable, then by the Common Law.

In a case decided in 13 Cal., the question was what was meant by the term Common Law, as used in this Act of Congress.

The Court say :

" Having reached the conclusion that the law
" governing this assignment, and determining its
" validity, is the Common Law, it remains to con-
" sider the objections urged against it in connec-
" tion with that system. *We understand by the*
" '*Common Law' as used in the Act of Congress,*
" and applied to the arbitrament of controversies
" between citizens of the United States, that gen-
" eral body of law, which, as Judge Marshall ex-
" presses it, is constituted 'by those general prin-
" ' ciples and those general usages which are to be
" ' found, not in the legislative Acts of any parti-
" ' cular State, but that generally recognized and
" ' long established law which forms the sub-
" ' stratum of the laws of every State ;' *i. e.*, every
" State carved out of the British colonies. *We*
" *may look to American, as well as English books,*
" *and to American as well as to English jurists,*
" *to ascertain what this law is, for neither the*
" *opinions nor precedents of Judges can be said,*
" *with strict propriety, to be the law—they are only*
" *evidence of law.* Mr. Cushing, in the same
" opinion from which we have quoted (Vol. 7, 504
" Opinions of Attorney-General) says : '*By "Com-*
" ' " *mon Law" (in the Act of 1848) is intended*
" ' *that law which is to be found in the decisions of*
" ' *the courts of justice of the United States, both*
" ' *Federal and State,* as distinguished from that
" ' law which is fonnd in the statute law of the
" ' United States, and of the States.'

"And this language is incorporated in the "Regulations by Commissioner McLane."

Forbes vs. *Scannell*, 13 Cal., 285–6.

Here was a Court established and a provision providing that it should be governed by the Common Law. It would have been just as reasonable for the Attorney-General to have held that the Common Law as understood and administered on July 4, 1776, was to govern in that case as it is to say that in a case when a new State is formed, and the legislature of such State adopts the Common Law as the rule of decisions, that the Act adopting such law, in which no date is fixed, referred to a date antedating the Act by 75 years. We submit that his Court is not going to place a construction upon this Act that would lead to such absurd results as would a decision holding that California adopted the Common Law of England as understood and administered on July 4, 1776.

Until April 13, 1850, the civil law had been the rule of decision in this State.

The quotation from Cooley's *Cont. Lim.* (p. 25), on page 106 of defendant's counsel's Argument and Authorities, referred to the colonies, *which had* adopted the Common Law, and not to States formed long afterwards.

We did not adopt the American Common Law or the Common Law of the older States, but the Common Law of England. And the counsel for defendant admit that long before 1850, in 1832, the question of water rights was fully established in favor of riparian rights.

If the position of counsel for defendant be correct, and we cannot refer to *Mason* vs. *Hill*, or *Taylor* vs. *Wilkinson*, to show what the rule of Common Law is in relation to water rights, then we have no use for the English Reports, or Reports of the older States, from the period between 1776 and 1850, or so far as that is concerned, any of them since 1776; for if we must rely upon the reports of cases decided prior to 1776, to show what the Common Law is or was on a given question, and cannot refer to later cases, then we are certainly in a position no other State in the Union is placed in.

But we submit that is not the fact or the law. If any rule of Common Law has been misunderstood and misstated in earlier reports, and corrected in later, California, in common with every other State, is benefitted by such later decision and correction. Such decisions are not understood as overruling the decision and making a new law, but as vindicating the old one from misrepresentations.

2 Wait's A. and D., p. 287.

Kent, in his commentaries, says:

"But the evidence of the Common Law is to "be found in the decisions of the Courts of Jus- "tice contained in numerous reports, and in the "treatises and digests of learned men, which have "been multiplied *from the earliest period of the* "*English History to the present time.* The reports "of judicial decisions contain the most certain evi-

" dence, and the most authoritive and precise ap-
" plication of the rules of the Common Law."

1 Kent Com., 473.

Reports down to present time, not down to April 13, 1850, or to July 4, 1876.

If the position taken by counsel for defendant be correct, then they can only rely upon the single case found in 1st Ventris, as that is the only case decided prior to 1776 that is cited by them, all the other cases were decided after July 4, 1776.

Counsel for defendant, on page 23 of their argument say:

" It is contended on behalf of the appellants,
" as we understand their counsel, that the modern
" English doctrine, as laid down in the leading
" case of *Mason* vs. *Hill*, and the English and
" American cases which have followed it, is and
" always has been the law of California."

And they in all their briefs filed refer to this case of *Mason* vs. *Hill*, as being the first case to lay down what they style the " Modern Common Law Doctrine of Riparian Rights."

Mason vs. *Hill* was first decided in 1832.

Judge Story had seven years before that, in *Tyler* vs. *Wilkinson*, recognized the same rule as laid down by the English cases, and clearly defined the rights of riparian owners to be the same, as afterwards so clearly stated by Lord Denman.

Even before this (in 1826) Chancellor Kent, whom Walker, J., in *Fleming* vs. *Davis*, 37

Texas, 194, styles "a most orthodox authority" on Common Law questions, had stated the rule governing rights in running water to be the same that we are now contending for, and then added:

"This is the *clear and settled* general doctrine "on the subject, and all the difficulty which arises "consists in the application." (3 Kent, p. 439–40.)

But we deny that the right of riparian owners as defined by Chancellor Kent, Judge Story and Lord Denman, is a modern Common Law doctrine.

In support of this proposition they refer to several early English decisions.

Much is claimed by counsel for defendant for the case of *Cox* vs. *Mathews* (1 Vent.) on account of its antiquity. That report covers the period from 1668 to 1691. Counsel only give a portion of the decision in that case as reported in 1st Ventris. The following is a complete transcript of all that appears in that report in connection with the case.

Cox vs. *Mathews* (1 Ventris, 237).

"In an action for action for a nuisance in stop-"ping of the lights of his house, exception was "taken to the declaration, for that he did not say "*antiquum meffuagium;* and yet it was ruled to "be good enough, for perhaps the house was new "built; and the truth of this case was said to be "that the defendant had built the honse and let it "to the plaintiff, and would now go to stop up the "lights, Hale said:

"'If a man hath a watercourse running
"'through his grounds, and erects a mill
"'upon it, he may bring his action for diverting
"'the stream and not say *antiquum molenduum*,
"'and upon the evidence it will appear, whether
"'the defendant hath ground through which the
"'stream runs before the plaintiffs, and that he
"'need to turn the stream as he saw cause, for
"'otherwise he cannot justify it, though the mill
"'be newly created.'"

It will clearly appear to this Court that the question of water rights was in no manner before the Court in that case, and the remarks of Lord Hale were "*obiter*," as stated by Lord Denman in the case of *Mason* vs. *Hill*. But we claim that long before this case of *Cox* vs. *Mathews* was before the Courts, this question of riparian rights had been before the English Courts and decided in favor of riparian rights, and against appropriations. We refer your Honors to the case of *Duncombe* vs. *Sir Edward Randall* (Hetley's Report, page 34, published 1657) from 11 to 14 years prior to the time the case of *Cox* vs. *Mathews*, was decided. Following is a copy of the decision in *Duncombe* vs. *Randall*.

"In an action upon the case between Dun-
"combe and Sir Edward Randall for diversion
"and stopping of a river, it was agreed by the
"Court, that if one had anciently ponds which
"are replenished by the channels of a river. He
"cannot change the channels if any prejudice ac-
"crue to another by that, and yet the effect by

" presturious is to have the pond fed out of the
" river, but *sic utero tuo ut res laedas alieuo.*

Duncombe vs. *Sir Edward Randall*, Hetley's Rep., p. 34.

We also refer to an early English case where the right of a riparian owner is defined to be the same as now understood, a case decided in 1797, that of *Brown* vs. *Best* (1st Wilson's Reports, 174.)

In 1798, in *Prescott* vs. *Phillips*, before Mr. Sergeant Adair, Chief Justice of Chester, it was held that nothing less than 20 years' undisturbed possession of water diverted from a natural channel would give a right as against those whose lands lay lower down the stream. It was held that although 19 years' adverse use was shown, that would not do. This Case is cited in *Bealey* vs. *Shaw*, 6 East., 208, and also in *Mason* vs. *Hill*, 5 B. & A., 25.

In February, 1823, nine years before *Mason* vs. *Hill* was decided, in *Wright* vs. *Howard*, 1 Sim. & Stu., 190, this question of riparian rights was fully discussed and defined and clearly settled. The Court say :

" The right to the use of water rests on clear
" and settled principles. *Prima facie* the pro-
" prietor of each bank of a stream is the proprie-
" tor of half the land covered by the stream, but
" there is no property in the water. Every pro-
" prietor has an equal right to use the water which
" flows in the stream, and consequently no pro-
" prietor can have the right to use the water to
" the prejudice of any proprietor. Without the

" consent of the other proprietors who may be af-
" fected by his operations, no proprietor can either
" diminish the quantity of water which would
" otherwise descend to the proprietor below, or
" throw the water back upon the proprietor
" above," and then asserts that any one claiming such right must prove an actual grant or license or prove an uninterrupted enjoyment for twenty years.

A year later, in 1824, the case of *Williams* vs. *Moreland*, 2 B. & C., so much relied upon by defendant's counsel was decided.

Then, in 1832, came the case of *Mason* vs. *Hill*, 3 B. & A.; and in 1833 the case was a second time before the Court.

In *Ackwright* vs. *Gell*. 5 Meeson & W., 22, Parke B. said of the decisions in *Williams* vs. *Moreland* and *Mason* vs. *Hill*: " The object of
" the jndgment in *Mason* vs. *Hill* was to set right
" the *mistaken notion that had got abroad in conse-*
" *quence of certain dicta* in *Williams* vs. *More-*
" *land* that flowing water was *publici juris*, and
" *that the occupant of it for a beneficial purpose*
" *may appropriate it.*"

Another case relied upon by defendant is *Canham* vs. *Fish*, 2 C. & J., 128; but a note found at the foot of page 128, after citing *Mason* vs. *Hill* and numerous other English cases, and adding, " and the American cases are to the same ef-
" fect," says: " The notion therefore of Baron

" Bayley in *Canham* vs. *Fish* that one method of
" acquiring a right to water is by appropriation
" may be considered as exploded."

We think the position taken by counsel for defendant is fully answered by Lord Denman in the case of *Mason* vs. *Hill*, and by Judge Story in the case of *Tyler* vs. *Wilkinson*.

It would seem that this same position was takin by counsel in *Mason* vs. *Hill*, they claiming that the first occupant of running water for a beneficial purpose had a good title to it as against a lower riparian owner.

Lord Denman says: " We think this has origi-
" nated in a mistaken view of the principles laid
" down in the decision in the case of *Bealy* vs.
" *Shaw* (6 East), *Sanders* vs. *Nerrin* (1 B. & A.),
" *Williams* vs. *Moreland* (2 B. & C.). It appears
" to us also that the doctrine of Blackstone, and
" the dicta of learned Judges, both in some of
" these cases and in that of *Cox* vs. *Matthews* (1
" Vent.), has been misunderstood."

Lord Denman then proceeds and reviews the cases and shows that they support the doctrine of riparian rights, and referring also to *Liggins* vs. *Inge*, (7 Bingham) a case relied upon by the defendants in this case, he says: " None of this
" dicta, when properly understood in reference
" to the cases in which they were cited and the
" original authorities in the Roman Law from
" which the position, that water is *publici juris*, is
" deduced ought to be considered as authorities
" that the first occupier or the first person who

" claims to appropriate an actual stream to useful
" purposes has a right against the owner of land
" below and may deprive him of the benefit of
" the natural flow of water." (Page 23.)

At page 25, Lord Denman, referring to the case so much relied upon by counsel in this case, in 1st Ventris shows that it is against the principles contended for by counsel, and only holds that the right to divert water, cau only be gained by prescription.

Counsel for defendant in this case rely upon the very same cases that were urged against the doctrine of riparian rights in *Mason* vs. *Hill* and *Tyler* vs. *Wilkinson*, impart in *Van Sickler* vs. *Haines*, and in *Davis* vs. *Fleming*, and in *Mason* vs. *Hill* Lord Denman reviews nearly every case relied upon by counsel for defendant and says after such review, " None of these decisions when prop-
" erly understood with reference to the cases in
" which they were cited, etc. * * ought to be
" considered as authority," etc.

After such learned and able Judges as Lord Denman, Story, Lewis, Garber and Chancellor Kent have all decided that this doctrine of riparian rights is well established, and that not only the weight of authority but all the authorities, when properly understood, are in favor of it, we cannot understand how it is that counsel can of this late date seriously contend that the doctrine of appropriation now exists or ever did exist.

It must be something more than the considerations enumerated by Cornelius O'Doud in the article from Blackwood's Magazine, to which we

have referred, that induce counsel to not only fully come up to the description of an over-fervent and over-zealous lawyer, so graphically pictured in that article, but to go further, and ask your Honors in this case to destroy old and familiar doctrines; to destroy what may be termed the landmarks of the law; to overrule the decisions of every Supreme Court of every State in the Union (with a single exception), each and every one of which have recognized the doctrine of riparian rights. You are asked to override the decision of the Supreme Court of the United States which, despite the arguments of counsel for defendants, has distinctly recognized the doctrine of riparian rights as a Common Law doctrine; and you are asked to overrule numerous decisions of the Supreme Court of this State, recognizing and re-recognizing the doctrine of riparian rights, down to the last decision, not yet published.

Wilcox vs. *Hausch*, Jan. 22, 1884.

To those decisions we will refer our rights, to principles so long and so well established; that—in the language of one of the counsel when a Judge—the authorities are all one way upon these doctrines.

Rulings of the Judge of the Superior Court excepted to by plaintiffs, and upon which they rely on their appeal from the judgment entered in this case.

The first 102 pages of our first brief are devoted to our objections to the rulings of the Court

made during the trial. We do not, in this brief, reproduce, nor do we except as in a few points add anything to our argument and authorities presented in our first brief. We call the attention of your Honors to that portion of our brief and to the rulings of the Court there complained of.

The last few pages of the last brief filed by defendants' counsel are devoted to our objections made to the rulings of the Court in refusing to permit us to introduce evidence in rebuttal to show that a channel existed at the points where defendants witnesses had crossed the body of swamp land, and where some of the witnesses testified they found no channel.

In our first brief field, we presented our objections to those rulings of the Court, and cited a great number of authorities in support of our position that the Court erred in ruling out our evidence. Counsel answer these authorities by a bald statement that the Court did not err, and do not trouble themselves to cite authorities in support of their position.

We respectfully refer your Honors to our first brief pages 63 to 89 where we have referred to the numerous rulings of the Court that we complain of in this connection and where will be found the authorities relied upon by us in support of our objections to such rulings.

So, as to the rulings of the Court in refusing to permit us to show the volume of water flowing in Kern River during the years 1879, 1880, and down to the date of his trial, again we have but the statement of counsel unsupported by authority to sus-

tain them, we have fully presented on pages 89 to 92 our objection to such rulings and to that portion of our first brief we call the attention of your Honors.

We also call the attention of your Honors to to the rulings of the Judge of the Superior Court in refusing to strike out certain portions of the answer of the defendant. The defendant, in its answer, set out ten distinct and separate answers and defences. The plaintiff moved to strike out several of them or portions of several of them as sham, irrelevant, and redundant. All the motions were denied. Still, no findings are in the record upon any of the facts set up in several of the answers.

We call special attention to these rulings, as we desire, should this case go back for a new trial, to have eliminated from the pleadings certain portions of the answers wherein it is attempted to set up the rights of other corporations and persons in no manner connected with either the plaintiff or defendant, and not have days devoted to putting in evidence to establish facts that are irrelevant to any issue between the plaintiff and defendant, and which defendant's counsel after resisting a motion to strike out, and, after consuming days of time in the lower Court in attempting to establish, do not prepare or ask for findings upon.

Our objections to such rulings will be found on pages 3 to 32 inclusive.

Do the physical characteristics of California demand that this Court should disregard the Statute adopting the Common Law, as the rule governing the rights of riparian owners, and if so, can this Court, on the ground that public necessity demands it, or that some other rule is more equitable, adopt a rule other than that established by the Common Law?

First: We submit that neither the physical conditions or necessities of this State demand the adoption of any other rule than that established by the Common Law governing the rights of riparian owners.

Counsel for defendant say, and correctly, on page 26, in their Argument and Authorities, "Your Honors all know the physical conditions "of California and its wants, in so far as this ques-"tion of water is concerned."

What are these physical conditions that demand that this Court should disregard a rule adopted in 1850, and which we claim has been settled since the memory of man runneth not to the contrary?

And in place of the Common Law rule, what rule will your Honors adopt?

Your Honors know that this State is over 750 miles long; that in that 750 miles we have an almost numberless variety of climatic and physical conditions.

Is there a word in Taine's description of the climate of England (see Argument and Authorities of defendant, pages 26 and 27) that will not apply equally well to some parts of California.

" Your Honors know the physical condition of " California"; know that at the northern end of the State, the average rainfall is upwards of 40 inches, in the middle, San Francisco, about 22 inches, and decreasing as you go south, until at San Diego, the average is about 8 or 10 inches.

Is irrigation a necessity at any point north of San Francisco ?

Is it a necessity at any point between San Francisco and Merced ?

Is it a necessity along the coast south of San Francisco, and if so, at what point does it become a necessity ?

Is it necessary that a man owning land in any northern or middle county of this State should take the waters from a stream to raise a crop of grain, or conduct a farm in such manner as to give him a living ?

No doubt farming would be more profitable in some few counties of the State if the farmers could command the water coming from the Sierra Nevada, and flowing through some of the valleys in this State. But the question of profit cannot be considered ; it must be one of necessity, or as counsel for defendant say, one of "*imperious* necessity." And if this Court is to lay down a rule to take the place of the Common Law rule, it must be one for the whole State ; a general rule, not for any particular county or section ; for

Humboldt and Shasta counties, where they have upwards of 40 inches of rain and a climate by no means arid, and for San Francisco with its 22 inches, and San Diego with but 8 or 10 inches of rain and its semi-tropical climate, and for Kern County with its 4 inches of rain and hot and arid climate. It cannot lay down a rule predicated upon the supposed public necessity, in one, two or three counties, for the rule must apply to the whole State.

This Court must, if it holds the Common Law is not in force in California on account of the physical and climatic conditions of this State, demanding that another rule shall apply to water rights, place such departure on the ground of public necessity, and that, we submit, cannot be done. It is idle to talk of such a thing in California with its varied climates and unequal rainfall.

The position taken by counsel in this case is only that repeatedly taken by counsel in other States where they have endeavored to induce the higher Court of the State to declare the Common Law right of the riparian owner should give way to that of appropriation. It was the same argument that was made in the case of *Van Sickle* vs. *Haines* before the Supreme Court in Nevada.

Counsel for defendant claim in their last brief filed in this case (page 59):

"That in the State of Nevada there existed no such *controlling* reason for departing from the asserted doctrine of the Common Law, as to water rights," as exist in California.

We will admit that the Supreme Court of Nevada could not be induced to yield to any "*controlling reasons*" that were presented to the Court to induce it to depart from the asserted doctrine of the Common Law as to water rights, which Judge Garber in his concurring opinion in that case, said was sustained—"not merely by the weight of authority, *but by all the authorities.*"

But we by no means admit that irrigation is not as much a necessity in the State of Nevada as in California, and it appears by the leading opinion by Mr. Chief Justice Lewis, in that case, that it was on account of the importance of the question presented in that case, and the claim to its disastrous effect if the Court should adhere to its decision in favor of riparian rights that caused the Court to entertain the petition for a rehearing. The "controlling reason" that exists in this State, why the rights of riparian owners should give way to those of appropriators, that did not exist in Nevada, and the only one that was not urged in the Supreme Court of that State, is the claim put forward by the defendant and the owners of a few other large canals in this State, who can only obtain water to reclaim large tracts of desert land, which they have taken up, by securing the adoption of a rule that will permit them to take all the water from the rivers in California, regardless of its effect upon riparian owners on such rivers, and this fact affirmatively appears in this case. But we submit that the fact that the few persons who have located large tracts of desert lands in this State cannot perfect their title to the same unless they be

permitted to appropriate the waters of our rivers, that they may be able to comply with the provisions of the Act of Congress requiring them to conduct water to the land in such quantities as to render it possible to successfully cultivate it, does not create such a "public necessity" as demands, or would justify a complete unsettling of the laws of this State, and leave us without chart or compass, a result that must follow if this Court should hold that it may decide in what cases in its judgment it may disregard the rules of the Common Law for what it may deem a "public necessity."

In support of our statement that the necessity for irrigation is as great if not greater in Nevada than in California, we refer your Honors to two cases found in 2d Sawyer's Reports, *The United Mill and Mining Company* vs. *Ferris, United Mill and Mining Company* vs. *Daugberg*; both relating to property and water rights in the State of Nevada. The defendant claimed in the case against Ferris the right to divert water from the Carson River for irrigation purposes, claiming that in a hot and arid climate like that of Nevada, that irrigating was a natural want, like the thirst of man and cattle, to satisfy which the riparian proprietor may consume if necessary the whole stream, and that such use under the conditions there existing is reasonable. (page 190.)

Mr. Justice Hillyer quotes the law on the subject from Kent's Commentaries, pages 190 and 191, and approves of the doctrine laid down by the Chancellor, and on page 196, Hillyer, J., says: "*the climate of Nevada is arid in the summer sea-*

" *son, and the soil then needs irrigatiug to make it*
" *productive, but not always to the same extent. In*
" *the valley of the Carson River, some of the land*
" *needs little or no irrigation, other portions require*
" *a great deal.* The defendant's land requires less
" water than that of his neighbor Dangberg. In-
" deed some seasons he says it needs no water for
" irrigation in order to raise grain."

Can the climate of and soil of the few counties in this State with arid climates be better described, or in fewer words, than those used by Mr. Justice Hillyer to describe the climate and soil in the valley of the Carson River?

So it would appear from this decision that there is the same *controlling reason* that is so for as a hot and arid climate is concerned why parties should be permitted to appropriate water for irrigating purposes from the streams in Nevada, that exist in California, and it is common history that the climate of Nevada in the summer season is very similar to that of the interior of the southern part of this State, and further, that irrigation is, if anything, more of a necessity in Nevada than it is in California.

If we may be permitted to again refer to the leading case in that State on water rights (*Vansickle* vs. *Haines*, 7 Nevada), it will be seen that this question of the importance of the Court adopting a rule other than the Common Law rule governing water rights was fully presented in that Court, and strenuously urged by counsel, counsel claiming in that case as they do here, that the question was one of great interest to the public, and it was

claimed that their rights were seriously disturbed by the decision of the Court from which a rehearing was asked. Mr. Chief Justice Lewis on page 259 says:

"Before proceeding to an investigation of the "legal question really involved in the case, we "may state once for all, that the fact that the "case is of great interest to the public, whose "rights, it is claimed, are seriously disturbed by the "decision is a consideration which in very doubt-"ful cases may, nay, perhaps should have some "weight with judicial tribunals. But that the in-"terests of the public should receive a more favora-"ble consideration than those of any individual, "or that the legals rights of the humblest person in "the State should be sacrificed to the weal of "many, is a doctrine which it is to be hoped will "never receive sanction from the tribunals of this "country. The public is in nothing more inter-"ested than in scrupulously protecting each individ-"ual citizen in every right guaranteed to him by the "law, and in sacrificing none, not even the most "trivial to further its own interests. Every indi-"vidual has the right equally with the public at "large to claim a fair and impartial consideration "of his case; for the rights of the public are no "more sacred or entitled to greater protection in "law, than those of the individual.

"*Therefore, in actions between individuals, the "consideration of the public interest, has weight "only when there is grave doubt as to where the "right lies. This doctrine, which would justify "the Court in depriving a person of a civil right to-*

" *day for the public good, might to-morrow force*
" *them to sacrifice his life to the clamors of a*
" *mob; which would deprive Haines of his prop-*
" *erty at one time, might operate against Van*
" *Sickle at another. As in this case we have no doubt*
" *whatever as to what should be our conclusion; the*
" *fact that it may injuriously affect the public, can*
" *have no weight in its consideration. Happily*
" *however we do not think the decision if properly*
" *understood, will produce the generally disastrous*
" *result, apprehended by the Counsel for Respondent.*"

And it clearly appears that the judge who wrote the concurring opinion fully realized the importance of the question presented and that it was claimed that should the first opinion delivered in the case by Whitman, Judge, be permitted to stand, that the effect of such decision would be very disastrous to a large class of people in the State of Nevada. The concurring opinion is short and is as follows:

" By Garber, J., concurring,

" If I believed that a re-argument could throw
" any additional light on the questions involved, I
" would unhesitatingly advise the granting of the
" petition. *Because I feel sensibly that the deci-*
" *sion we have been compelled to render, in obe-*
" *dience to the law as it was written, and which it*
" *is our function to declare, and not to alter, may*
" *work great hardship in this particular case;* and
" as a general rule, applicable to a certain class of
" patents, may disappoint expectations long,
" though erroneously considered by the public as
" well founded. Unfortunately, this is not a case

" where such common error can be said to have
" made itself law; and, after as thorough an in-
" vestigation as I am capable of making, I feel
" constrained to concur in the position so fully
" elaborated by the Chief Justice, that, on every
" point essential to the case of the petitioner, not
" merely the weight of authority, but all the au-
" thorities are against him. *Against a clear and*
" *explicit rule of law, no arguments from incon-*
" *venience, however forcibly urged, can prevail.*
" As to the existence and extent of the right of
" riparian proprietor to use the water for irriga-
" tion, I intimate no opinion."

If your Honors will turn to page 316 of this brief, where the rain fall of California and Nevada is given, you will see that the average annual rain fall in the State in which counsel for defendant say no such " controlling reason " for a change of the Common Law rule exists, is about 6 or 7 inches, or about 1/30 of the average in California, and about the same as in the least favored portion of this State.

This same question has been before the Supreme Court of Texas, a State like California, with vast territory and of varied climates. The able counsel who were conducting the case in the interest of the appropriators insisted that the Common Law rule of riparian rights should not be held to apply to Texas, although that State, like California had adopted the Common Law, claiming that the physical conditions of Texas were such as to make the Common Law doctrine inapplicable to that State. But the Supreme Court

was not willing to subscribe to any such dangerous doctrine. The Court say :

" Walker, J. This suit involves a controversy " between the riparian owners of the land on and " through which a stream known as Simpson's " Creek, in San Saba County, rises and flows. " The County of San Saba is about ninety miles " northwest of the City of Austin, and in what is " generally known as the western part of the " State. The lands owned by the parties are lo- " cated within the boundaries of Fisher and Mil- " ler's Colony." (p. 192.)

* * * * *

" It is contended that public necessity now re- " quires that the rule of law which should govern " all such cases should be clearly and distinctly " announced by this Court, and that the case at " bar presents all the necessary facts to render " this duty imperative." (p. 193.)

* * * * *

" Let us look to the Common Law. A most " orthodox authority reads thus." (p. 194.)

The Court then quotes at length from 3 Kent's Comm., pp. 561–565, and then continues.

" This is the rule of the Common Law, but it " has not been every where recognized as applic- " able to the wants and condition of the people, " and a maxim of the Common Law, *cessante ra-* " *tione legis cessat ipsa lex* is cited to defeat the " application of the rule in this State.

" That certain portions of the State of Texas " are subject to periodical drouth, and that the " growth of vegetation would be greatly improved

" by the artificial application of water, are well
" understood facts; *but whilst irrigation may be*
" *recommended by economy, must it be regarded as*
" *a thing of necessity? If so, does the necessity*
" *exist throughout the State? If not, must we*
" *lay down a rule predicated upon supposed public*
" *necessity, which is to apply only to certain por-*
" *tions of the State for the reason that it could not*
" *find its predicate elsewhere?*" (p. 196–7.)

The Court then proceeds to quote from 4 Mason, 12 Wendell and 3 Scammon, and then continue:

" We are not certain that the country through
" which Simpson's Creek flows, is so anomalous
" in its character as to require either legislative
" or judicial departure from the rules laid down
" by these able Common Law authorities, and as
" shown by extract from Kent."

* * * * * * *

" The very able counsel who represent both
" sides of this case furnish us a learned expose of
" the Common Law. *On the one side it is admitted*
" *that the Common Law decisions of other States,*
" *and of England, are not applicable to the condi-*
" *tion of Texas, and it is claimed that a rule should*
" *be laid down applicable to the wants of our*
" *people.*" What Mr. Justice Bronson said in
" *Starr* vs. *Child*, 20 Wend., 149, may have its
" weight in every proper case; for it is wisely said
" by a great man. Such portions of the law of
" England as are not adapted to our condition, cer-
" tainly form no part of the law of this State. We
" never dreamed of a law of primogeniture. We

" eschew entails. There are very many of the pe-
" culiarities of British law which have no adapta-
" tion to our system; *but when we come to ques-*
" *tions purely of the Common Law, for the decision*
" *of which our own Courts have prescribed no prin-*
" *ciple, then we are expressly directed to go to the*
" *Common Law of England, for a rule of decision.*

" The concluding paragraph of the brief for ap-
" pellee, virtually admits that we are in this case, at
" sea without chart or compass. The paragraph
" reads thus: ' Upon the determination of the rule
" ' by which a division of this water should be
" ' made, although there may not be exact certainty
" ' of measurement, yet with the many examples,
" ' Texas ingenuity will not be at fault.' We con-
" fess we have not yet found the ' examples,'
" nor can we discover any precedent for the parti-
" tion of a stream of water, other than that fixed by
" the rules of the Common Law already stated in
" this opinion.

" We have heard of the glorious uncertainty of
" the law, but always regarded the ' uncertainty,'
" as a slander. The law has its certain rules, which
" although not mathematically, are morally exact.
" *This Court meet with many difficulties in arriv-*
" *ing at the moral exactitude attainable, but, we*
" *apprehend, were we to attempt judicial legisla-*
" *tion on this subject, we should find ourselves*
" *much more at fault than we now are, acting*
" *under long and well settled principles.*

" Mr. Angell, in his work on watercourses has
" very ably treated this subject, giving prominence
" to the opinions of able jurists who have decided

" the question. The case of *Cary* vs. *Daniels*,
" 8 Metcalf, 466 ; and also the case of *Hart* vs.
" *Evans*, are referredto on page 99 as sustaining
" *Johnson* vs. *Jordan*, 2 Metcalf, 239. In this
" case Shaw, C. J., remarked : 'Every person
" ' through whose lands a natural watercourse
" ' runs, has a right, *publici juris*, to the benefit
" ' of it as it passes through his land, for all
" ' the useful purposes to which it may be ap-
" ' plied ; and no proprietor of land on the same
" ' watercourse, either above or below, has a
" ' right unreasonably to divert it from flowing
" ' into his premises, or obstruct it in passing from
" ' them, or to corrupt or destroy it. It is in-
" ' separably annexed to the soil and passes with
" ' it not as an easement, nor as an appurtenance
" ' but as parcel. Use does not create it,
" ' disuse cannot destroy or suspend lt. Unity
" ' of title and of possession in such land, with
" ' the lands above or below, it does not extinguish
" ' or suspend it.' This doctrine is founded on
" the well-known maxim, *sic utere tuo at alienum*
" *non laedas*. We adopt this maxim as the rule
" for our decision in this case. It is explained
" clearly by the able authorities we have quoted."
(p. 200–1.)

Fleming vs. *Davis*, 37, Tex., 173.

The argument made in this case by counsel for appellee, is, like the decision of the Court, so much in point in this case that we cannot refrain from quoting from it. Every reason urged in that argument in support of the proposition that

there was nothing in the physical condition of Texas that would warrant the Supreme Court in deciding that it would not in its decision be governed by the Common Law rule relating to water rights, is equally applicable to this case, and in this State, counsel in the last case cited say on pp. 189–90:

"The distinction between the necessary use of "water on the one part, and the mechanical or "speculative use, and gain on the other, while "easily perceived, will not admit of exact defini-"tion. Water is necessary to the culture and "growth of plants and grain, and when not sup-"plied by rain in quantities, and regularity to "meet the wants of vegetation sufficient for the "support of man; and when by artificial means, "the want can be supplied when such artificial "aid is requisite to render agriculture a source of "supply for food, then, as food is necessary, the "means to provide it becomes so, and irrigation "becomes a necessity, and such use is to supply "natural wants. In such cases there is no law or "limit to its use.

"But we have no such country in San Saba "County. Uplands afford wheat and corn in "good crops without artificial aid; the valleys "are better, and increased only one-third by irri-"gation. But a small proportion of the popula-"tion can have any water for their fields, save as "supplied by the rains of heaven. When the "gains from irrigation can be counted and meas-"ured, compared with the natural culture of the "fields, *when successful agriculture is possible*

" *without it, with it advantageons—when the gains* " *from irrigation become wealth, an object of com-* " *putatiou, then, to claim it to the exclusion of the* " *lower proprietor, is to work him an injury with-* " *out the plea of necessity, and such claim enforced* " *becomes unlawful, and gives plaintiff the right to* " *recover.*"

" *Here irrigation is measured in the increased* " *profits; it is demanded by love of gain, not by ne-* " *cessity. Its object is not to convert a desert to a* " *fertile field, but to increase the fertility of an al-* " *ready fruitful soil. The defendant pleas neces-* " *sity that his gains from labor be more ample and* " *his income more certain.*"

Counsel for defendant, on page 48 of their Argument and Authorities, say:

" But we do say that the *decisions* on this sub- " ject in California, considered with reference to " the facts, are all one way; and that there is no " California decision which should stand in the " way of this Court in rendering a judgment in " this case and declaring a principle to govern this " and similar cases *in accordance with the imperi-* " *ous necessities and wants of this State.*"

This statement and claim is certainly put forth in no feeble manner, and it is advanced by counsel who fully understand the position they occupy; and if any reason or ground can be put forth (which we deny) that would authorize or justify this Court in disregarding all the authorities cited by us and the statute making the Common Law the rule of decision in all the courts of this State,

it is the one urged by counsel for defendant, that it is demanded by "*the imperious necessities and* "*wants of California.*"

But is the territory which goes to make up the State of California so anomalous in its character, as to require judicial departure from the rules laid down by such able Common-Law authorities as Lord Denman, Judge Story, and Chancellor Kent? Are the necessities so very pressing and imperative as counsel would have us think they are, and do the wants and demands of the State require your Honors to disregard the Statute which declared that the Common Law "shall be the rule of "decisions in all the Courts of this State"? And also the provisions of the very act under which defendant claims the right to divert water from Kern river, which declares that "The rights of riparian owners shall not be affected by the provisions of this title." (Sec. 1422, C. C.)

We submit that there is no such *imperious* necessity, but, on the contrary, there is absolutely no good reason put forward why this Court should render a judgment that would have the effect of unsettling the whole legal system of this State.

What do the statistics show?

First.—As to climate and rainfall.

The following is from page 73 of the Alta California Almanac for 1883:

RAIN STATISTICS.

The following table represents the rainfall of the last season at stations which report to S. S. Montague, Chief Engineer of the Central Pacific Railroad. The observatians were made at

stations of the different railroads. Those from Reno to Toano are in Nevada, those from Terrace to Ogden in Utah, and that of Yuma in Arizona, the remainder being in different portions of California. The amount of rainfall is given in round inches at each place, preserving the value of the fractions as nearly as possible; thus the integer 9 represents any fraction between 8.51 and 9·49. The snowfall is included, estimating a foot of fresh snow as an equivalent to an inch of rain. San Francisco received about one-half the rainfall of the preceding year. The parts of the State which were most favored with rain, as compared with preceding years, were the extreme northern counties, the coast counties below San Francisco, the northern part of Sacramento Valley, and the region of the Sierras.

STATIONS.	SEASONS.								
	1881—82	1880—81	1879—80	1878—79	1877—78	1876—77	1875—76	1874—75	1873—74	1872—73
San Francisco.	16	30	25	23	32	9	25	18	23	18
Niles	14	20	18	15	29	9	25	12	14	14
Livermore	12	16	16	10	17	6	19	12	12	10
Ellis	..	..	..	..	11	5	10	9	9	8
Stockton	11	15	16	12	18	7	18	11	15	11
Sacramento	14	22	24	17	23	9	25	18	24	11
Rocklin	19	21	22	20	26	11	23	13	22	16
Auburn	34	37	42	35	36	19	44	28	35	25
Colfax	56	48	57	48	43	28	60	37	48	33
Alta	61	51	48	70	49	32	62	39	47	..
Emigrant Gap.	62	62	85	71	55	19	64	42	69	53
Summit	62	66	86	57	43	31	72	49	..	39
Truckee	37	22	41	22	24	18	40	21	28	22
Boca	24	16	20	19	16	8	18	15	20	10
Reno	6	6	6	4	6	5	3	5	5	4
Wadsworth	6	4	3	3	4	5	1	4	4	2
Hot Springs	3	3	3	4	4	3	4	7	4	2
Brown's	3	3	4	4	6	5	2	6	3	2
Humboldt	9	6	5	6	6	5	7	5	3	6
Winnemucca	11	10	7	7	5	8	5	10	8	10
Iron Point	..	..	..	..	7	9	7	7	2	10
Battle Mountn	10	6	4	5	6	9	7	7	6	4
Beowawe	5	6	5	4	8	11	6	6	4	4
Carlin	8	10	5	5	8	0	9	5	7	9
Elko	6	5	4	5	3	8	3	3	6	8
Halleck	8	5	13	10	8	6	4	5	4	5
Wells	11	4	4	4	6	8	16	13	17	17
Cedar	..	..	..	..	10	17	17	13	11	20
Toano	3	2	5	2	5	5	9	9	9	10
Terrace	3	4	4	5	3	5	4	7	2	2
Promontory	8	3	6	8	10	8	12	11	11	5
Corinne	10	5	7	6	8	8	16	13	12	14
Ogden	18	12	12	12	13	16	21	14	11	14
Marysville	14	17	19	16	24	12	17	14	26	14
Chico	17	18	18	19	35	17	24	19	25	15
Tehama	13	10	16	9	30	11	21	13	14	11
Red Bluff	22	29	30	21	53	15	24	14	17	14
Redding	25	51	37	37	60	26	..	9	..	..
Modesto	7	8	13	8	12	4	13	8	10	7
Merced	9	12	12	6	12	3	12	10	..	11

STATIONS.	SEASONS.								
	1881—2	1880—81	1879—80	1878—79	1877—78	1876—7	1875—76	1874—75	1873—74	1872—73
Borden	6	11	9	5	13	2	4	..	..	..
Tulare	5	10	8	3	8	4	6	..	..	..
Delano	5	7	9	1	..	4	3	..	..	..
Sumner	3	4	6	1	8	3	5	..	..	..
Caliente	10	10	15	3	17	9	4	..	..	..
Tehachapi	8	8	16	6	17	..	..	..	..	..
Mojave	1	1	8	3	7	..	.	..	..	..
Newhall	10	9	20	7	11	..	..	..	..	..
Los Angeles	9	10	13	8	17	5	22	..		..
Spadra	8	10	15	6	18	6	19	..	..	..
Colton	7	6	9	7	..	..	..	..	..	..
Banning	..	..	15	6	..	..	..	..	..	..
White Water	1	5	6	3	..	..	..	..	..	..
Indio	2	1	0	2	..	..	..	..	..	..
Mammoth Tank.	3	2	1	2	..	..	..	..	..	..
Yuma	2	1	0	4	..	..	..	..	..	..
Davis	..	19	17	13	20	8	18	12	18	12
Fairfield	..	..	19	21	27	10	7	19	21	15
South Vallejo	14	22	21	12	18	7	16	..	..	..
Calistoga	23	40	38	36	50	22	39	26	14	..
Napa	17	28	37	26	35	9	..	..	..	..
Woodland	11	19	17	17	25	5	..	..	..	..
Dunnigan	12	20	14	12	22	..	..	..	..	..
Williams	8	15	12	9	22		..	..	..	..
Farmington	13	13	..	13	18	..	..	..	..	..
Petaluma	17	23	..	22	39	13	2	18	26	14
Mount Diablo	..	..	..		..	12	29	..	..	..
San Mateo	13	21	21	18	27	7	26	..	..	..
San Jose	12	12	14	8	19	4	15	..	..	..
Gilroy	14	23	22	17	28	2	31	..	..	..
Hollister	10	12	12	9	18	5	17	..	..	..
Pajaro	15	20	17	17	29	6	26	..	..	..
Salinas	13	12	12	9	24	4	19	..	..	..
Soledad	10	7	8	4	12	2	14	..	..	..
Martinez	13	20	17	14	..	..	..	..	..	..
Antioch	8	17	11	7	..	..	..	..	..	..
Santa Cruz	23	30	18	22	..	..	..	..	..	..
Anaheim	7	7	11	4	..	..	..	..	..	..
Ione	19	17	22	17	..	..	..	..	..	.

And the following from page 71:

PACIFIC COAST CLIMATE.

The average rainfall is, at Sitka, 70 inches; Olympia, 53; Portland, 45; Astoria, 80; Crescent City, 34; Humboldt Bay, 30; San Francisco, 23; Santa Barbara, 15; San Diego, 10; Grass Valley, 35; Sacramento, 20; Stockton, 17; Fort Yuma, 3; Cisco, 33; Virginia Ctty, 6; Elko, 8; Salt Lake City, 10;

The mean temperature of January in San Francisco is, 49°; Vallejo, 47°; Sacramento 45°; Redding, 44°; Visalia, 47°; Humboldt Bay, 40°; Grass Valley, 27°; Sonoma, 45°; Monterey, 52°; Los Angeles, 52°; Santa Barbara, 53°; San Diego, 51°; Fort Yuma, 59°; Naples, 46°; London, 37°; Dijon, 31°; Cincinnati, 30°; Astoria, 43°; Portland, 39°; The Dalles, 33°; Olympia, 38°; Reno, 30°; and Salt Lake City, 27°.

The mean temperature of July in San Francisco is, 57°. Vallejo, 67°; Sacramento, 73°; Redding, 80°; Visalia, 85°; Humboldt Bay, 58°; Grass Valley, 63°; Sonoma, 66°; Monterey, 58°; Los Angeles, 75°; Santa Barbara, 73°; San Diego, 72°; Fort Yuma, 92; Naples, 76°; London, 62°; Dijon, 70°; Cincinnati, 74°; Astoria, 61°; Portland, 72°; The Dalles, 83°; Olympia, 64°; Reno, 75°; and Salt Lake City, 76°.

The foregoing statistics show no climatic characteristics that are startling, or that demand radical measures to overcome.

Second. Now, let us see what the effect of these physical and climatic features of California have upon the prosperity of this State, and upon its products.

The Assessors of the several counties in this State are required to make annual returns to the Surveyor-General, showing, among other things, the yield of wheat, barley, wine, etc., in their respective counties, and the Surveyor-General, in

his Biennial Report, gives this information to the citizens of California. We have before us those reports from 1873 to 1880–1.

These reports show the yield of wheat and barley (bushels) and wine (gallons) to be as follows:

YEARS.	WHEAT.	BARLEY.	WINE.
1873	28,748,571	11,063,564	3,858,027
1874	30,248,341	9,261,940	3,892,775
1875	32,341,609	25,883,314	8,200,919
1876	35,385,597	13,224,060	6,194,292
1877	17,451,181	7,748,178	6,222,802
1878	28,643,318	12,275,227	7,790,365
1880	46,000,000	10,000,000	8,000,000
1881	48,500,000	12,000,000	8,000,000

With this yield of wheat and barley, and that too with practically no irrigation, is the demand for irrigation *imperious*?

Can we not, without irrigation in any form, not only raise food enough for all of the 1,000,000 citizens of California, but have some to spare, as we have in the past?

For the past ten years we have sent out of this State, by water alone, an average of $22,306,000 worth of wheat, per annum.

The following is from the commercial columns of the San Francisco Bulletin of January 4, 1884:

The shipments of wheat and flour from California by water since July 1, 1873, to December

31, 1883, as expressed in tons or 2,000 lbs wheat, are as follows :

	TONS.	VALUE.
1873–74	455,300	$19,400,000
1874–75	508,800	16,134,300
1875-76	373,300	14,751,800
1876–77	604,100	21,335,100
1877–78	259,200	11,580,100
1878–79	580,100	19,842,900
1879–80	600,000	21,538,200
1880–81	767,500	21,989,100
1881–82	1,239,000	40,567,600
1882–83	894,882	31,140,400
1883–84—first six months	467,420	15,933,700

Certainly, a very good showing for a State where there is comparatively little grain raised on irrigated land. In Tulare County quite a little grain is raised on irrigated land. In Fresno and Kern Counties not near so much, and very little is raised on irrigated land outside of these three counties.

It is not claimed by defendant's counsel that facts appeared in the record in this case that would warrant your Honor in disregarding the rules of Common Law governing water rights. But their positions, is that from the facts which your Honors will take judicial notice such ruling will be justified and defendant's counsel say that as " your Honors all know the physical conditions " of California and its wants so far as this question " of water rights is concerned," you can acting upon such knowledge decide in favor of appropriation and against riparian rights.

It is to meet this claim that we have given the foregoing statistics to show that there is no demand or necessity existing in this State for changing the law governing water rights which has been well settled since the memory of man runneth not to the contrary.

We dont understand that counsel for defendant claim that this Court can adopt or recognize a rule other than one for the whole State, that is a general rule, not a rule for the County of Kern alone, or one that shall apply solely to the rights of riparian owners on Buena Vista Slough or the rights of appropriation for the benefit of defendant's desert lands along the line of the Calloway canal.

But admitting for the sake of the argument that your Honors could in this case consider simply the facts presented in the record, and establish or recognize a rule that should simply apply to the riparian rights of the owners of desert lands along the Calloway Canal, and of the swamp and overflowed land along Buena Vista Slough, we submit that the facts presented do not call for the establishment of a rule other than established by the Common Law.

The facts presented by defendant are :

It owns a canal 80 feet wide on the bottom, with slope two to one, with a capacity of conveying four feet of water. This would make the width of the top of the canal 96 feet, and give an average width of 88 feet.

Roberts testified that when this case was on trial he was running 3 9-10 feet of water in the

12,000

canal, or 39-40 of its full capacity (T. II., folio 279), and he says they were then irrigating only about ~~1,200~~ acres. (Folio 286.)

James says 13,000 acres. (T. IX., fol. 880). And he says if the 13,000 acres of land were not irrigated from the Calloway, the crops would certainly perish. (T. IV, folio 885).

He also says: "70,000 acres approximately can be irrigated from that canal." (Folio 883.)

This then is the interest to be protected and fostered by a decision of this Court at the expense of the rights of the plaintiffs and all other owners of swamp and overflowed land along Buena Vista Slough, from Buena Vista to Tulare lakes, a distance in a direct line of 52 or 53 miles, leaving out of consideration the rights of all riparian owners on its several branches of Kern River below the Calloway head-gate.

The swamp and overflowed land along that slough amounts to about 200,000 acres.

Tracey says that land is good land except a strip along the margin, say about 1-12, which is alkali land, and that if the water is turned from it, it would be valueless for pasturing cattle on or for agricultural purposes. (T. II. folio 985–9.)

C. W. Clarke says of the swamp and overflowed land between Tracey's Crossing and Goose Lake: "Think it is as good a body of land as "there is in the country, to take that amount of "land together," and from that down to the Tules House it is about the same. (T. II., folio 1177–8). He is then asked:

" Q. If no water should run through Buena
" Vista Slough over this land for two or three
" years, what would be the effect of it on the
" land ?

" A. Well, it would be perfectly worthless land
" to purchase at all, with the exception of a wet
" year, or something like that. Of course rain will
" produce as well as water and would have the
" same effect.

" Q. You have stated that you sustained a loss
" of cattle there during 1877; what proportion of
" the cattle you had there did you lose during that
" year ?

" A. Well, I always put it more than the rest
" of them. Mr. Cox has always thought it was
" fifty per cent. I have always contended that it
" was two-thirds or sixty per cent. of that.

" Q. What was the cause of the death of
" those cattle ?

" A. Well, it was caused by the scarcity of
" water and feed, there not being water on the
" land to make feed.

" Q. *If the water was taken from that land*
" *for two or three years, wouldn't the land become*
" *like the desert land along the Calloway Canal?*

" *A. Yes, sir; I think more so.*" (T. I f.
" 1179–81.)

Taking the facts presented by this record, it comes down to the simple proposition, will this Court from any supposed policy or necessity, not public, hold that the defendant can take from Kern River a stream of water eighty-eight feet

feet wide, and four feet deep, or as Fillebrouen says, from 500 to 600 cubic feet per second, that 13,000 acres of desert land may be irrigated and profitably cultivated, with a possibility that 70,000 acres may at the same time be irrigated from the same canal? It will be noticed that James says: "seventy thousand acres approximately *can be irrigated from that canal.*" (T. IV., folio 883). But he does not say it can be irrigated with the amount of water that the canal is then capable of carrying, and by Finding 54 your Honors will see that the Calloway Canal claims the right to construct a canal from 100 to 120 feet wide on the bottom, and from 108 to 128 feet on top. This canal, if enlarged to that size, may possibly irrigate 70,000 acres of land; but if that number of acres should ever be irrigated from it, no other land along Kern River or Buena Vista Slough would receive a drop of water from Kern River.

And it affirmatively appears that when the canal is carrying 39-40 of its full capacity it is irrigating at most but 13,000 acres, and it is found as a fact that all of the water taken from Kern River by the Calloway Canal, that the defendant "*has appropriated and applied the same to* "*useful and beneficial purposes, that is to* "*say, to irrigating and supplying with* "*water lands in said notice of appropria-* "*tion designated and lying along the route* "*of said canal, and that all of said water*

" so diverted has been needed, used and con-
" sumed on said lands.

(59 finding, T. V., 6425.)

And by the following findings effect it appears that all this water has been used, although but 13,000 acres of land have been irrigated, and that the amount taken was " *necessary and reasonable.*"

73.

" That the use to which the water diverted
" by the defendant was applied was to supply
" a natural want, and the quantity taken
" was necessary and reasonable.

74.

" That on the lands irrigated by the Callo-
" way Canal irrigation is a natural want,
" and that defendant took no more of the
" waters of Kern River than was necessary
" and reasonable."

Will this Court upon this state of facts and showing as to benefits conferred upon 13,000 acres of Government land (for this land irrigated from the Calloway Canal is found to belong to the United States Government (Findings 23 and 50), deprive all of the 200,000 acres of land along Buena Vista Slough which is either owned by the State or by private individuals, of the water of Kern River and render it valueless for pasturing or agricultural purposes ; and as Mr. Clarke says make the land along Buena Vista Slough more of

a desert in its character than the land along the Calloway Canal. (T. II. fol. 181.)

We respectfully submit that the claim advanced by defendant in this case is not supported by reason, as the law, or by necessity either public or private; but on the contrary is one void of all equity, and cannot be viewed with any favor by this Court.

In a word, it comes down to this single proposition. The waters of Kern River are not capable of irrigating the desert land lying along the Calloway Canal, and as a great distance from the river, and also the land along Kern River and Buena Vista Slough which have from time immemorial been irrigated by the waters of said river. That being the case, shall the water continue to flow in the channels nature prepared for it, and make valuable all the land along such channels, or shall a private speculator take the water away from its natural course, to reclaim a desert, and cause to become desert all the land heretofore supplied with water by Kern River.

We submit that this Court cannot and will not by its decision in this case attempt to do any such thing.

SECOND.

We submit that this Court has no power to adopt a rule in place of that established by Common Law governing water rights.

If the common law is one that should not, on the ground of public neccessity or public policy

remain in force in California, that is a matter for consideration of the Legislature. This Court cannot make the change.

Repeated attempts have been made in the Supreme Court of this State to induce it to declare that in certain cases where it was claimed the common law rule was inequitable, or where it was claimed the reason of the rule ceased that the Court would disregard such rules, but the Court has alwaysheld that it was governed by the rules of Common Law, except in so far as had been modified or changed by statute. The first case found in our reports is

Johnson vs. *Fall*, 6 Cal., 361.

In this case counsel sought to obtain from the Supreme Court a decision declaring certain wagers not recoverable that were at common law recoverable, counsel contending that the English judges had uniformily looked with disfavor on the class of cases and had frequently taken occasion to express their regret that a different rule had not been established, and that the Supreme Court should, as the question was presented for the first time in this State, without regard to precedent, declare all wagers illegal on account of their manifest immoral tendency. But the Court say; "Such a course would, we conceive, be a usurpa-
" tion of functions properly belonging to another
" department of government. *The common law*
" *having been adopted as the rule of decision in*
" *this State, it is our duty to enforce it, leaving*

" *all questions of its policy, as applied to a partic-*
" *ular class of contracts, for the consideration of*
" *the legislation.*"

In the case of *Van Maren* vs. *Johnson*, 15 Cal., 309, counsel sought to induce the Supreme Court to declare the Common Law rule that a husband was liable for the debts of his wife contracted before marriage to the extent of the community property, claiming that as under the Common Law the husband received her personal property, and was compelled to pay her debts. and as under our statute such was not the rule, therefore the reason of the Common Law rule ceased, and that the rule should cease also. But Chief Justice Field in delivering the opinion of the Court, says :

" The objection must then be solved by con-
" siderations arising from the rule of the Common
" Law. *That law constitutes the basis of our juris-*
" *prudence, and rights and liabilities must be deter-*
" *mined in accordance with its principles, except so*
" *far as they are modified by statute.*"

Van Maren vs. *Johnson*, 15 Cal., 312.

Again, in *People* vs. *De la Guerra*, 24 Cal., 76, the Court say :

" At an early day the Common Law was
" adopted as the rule of decision in this State
" and the rule of Common Law prevails except
" as to those particulars in which modifications
" have been made by statute."

In *Reed* vs. *Eldridge*, 27 Cal., 348, the Court say:

"Upon the adoption of the Common Law in "this State, the Courts became subject to all its "provisions, both as to their powers and the mode "of procedure, except in so far as the Statute "worked a change in the Common Law rules."

In a case reported in 33 Texas, an effort was made to get that Court to declare the rules of Common Law should not govern its decisions when it was claimed public necessity demanded another rule, and the Court say:

"It is difficult for us to see how the Courts of "this State are to ignore the Common Law as a "rule of decision, when it is made so by the "Statute, and adopt the Civil Law, even although "it have the merit of superior equity."

Diamond vs. *Harris*, 33 Tex.,637.

In a very recent case decided by the Supreme Court of Rhode Island, this question was presented and urged by counsel, that the Common Law rule relating to water rights, while it might be very good law in former days, that change of circumstances made Rhode Island a State largely interested in manufactories, and that the wealth of the State depended mainly on their prosperity, and that the lesser use should give way to the more valuable use. But such claims met with no favor at the hands of the Court. It says:

"The right of the riparian owner, be he farmer or "mill owner, to have the water pass his land in

" its natural state, and to a certain use of it as it
" passes, not, however, injuring it for the use of
" others, is just as much his property as the land
" itself. *This Court cannot alter the law.*"

Silver S. B. & D. Co. vs. *Wankuck Co.*,
XV Reporter, 95.

On this question the Supreme Court of Mississippi say:

" Whenever a principle of the Common Law
" has been once clearly and unquestionably recog-
" nized and established, the Courts of the country
" must enforce it, until it be repealed by the Legis-
" lature, as long as there is a subject-matter for
" the principle to operate upon; and this, too, al-
" though the reasons, in the opinion of the Courts
" which induced its original establishment have
" ceased. This we conceive to be the established
" doctrine of the Courts of this country in every
" State where the principles of the Common Law
" prevail. *Were it otherwise, the rules of law*
" *would be as fluctuating and unsettled as the opin-*
" *ions of the different judges administering them*
" *might happen to differ in relation to the existence*
" *of sufficient and valid reasons for maintaining*
" *and upholding them.*"

Powell vs. *Brandon*, 24 Miss., 363–4.

Quoted at length and approved in *Coburn* vs. *Harney*, 18 Wis. 150.

A similar case arose in England, and the Court held that the development of the national wealth

by factories, however desirable it may be, cannot be allowed to take away a man's legal right to pure water.

If the interest be one of great public importance, then let the State, by condemnation and compensation, acquire the right to pollute the stream.

> *Buccleugh* vs. *Cowan*, 5 Sess. Cases (1866–7) 237–8.
>
> Also *Bamford* vs. *Turnley*, 31 L. J.(Q. B.), 286.

The claim put forth by counsel for defendant that there are important interests involved in this case, or depending upon the decision that this Court shall render in this case, cannot be considered by this Court.

In a case reported in 15 Cal., the Court said:

" It is contended that, under the circumstances, " the erection of these dams was justifiable and " proper, and that the great value of the lakes as " reservoirs is a sufficient justification for injuries " resulting to the plaintiffs. We are aware of no " principle of law upon which such a position can " be maintained. If the injuries to the plaintiffs " were of a trivial character, they should, perhaps, " be considered *damnum absque injuria;* but a " comparison of the value of conflicting rights, " would be a novel mode of determining their " legal superiority."

> *Weaver* vs. *Eureka Lake Co.*, 15 Cal., 274.

And in the case of *Wixon* vs. *Bear River, etc., Co.*, 24 Cal., 373, the Court say :

" The four remaining instructions refused by the " Court are founded upon the theory that, in the " mineral districts of this State, the rights of own- " ers and persons owning ditches constructed for " mining purposes, are paramount to all other " rights and interests of a different character, re- " gardless of the time or mode of their acquisition ; " thus annihilating the doctrine of priority in all " cases where the contest is between a miner or " ditch-owner and one who claims the exercise of " any other kind of right or the ownership of any " other kind of interest. To such a doctrine, we " are unable to subscribe, nor do we think it " clothed with a plausibility sufficient to justify us " in combatting it."

Sawyer, J., referring to the last two cases cited, in *Woodruff* vs. *North Bloomfield G. M. Co.*, 1 W. C. R., 230, says :

" But authority is not necessary on so plain a " proposition."

See also *Van Sickle* vs. *Haines*, 7 Mo., 259.

We would suggest that your Honors examine the tables on pages 58 and 73 of the last report of the Surveyor-General of this State, 1880–2, and if you should, we are inclined to the opinion that you will come to the conclusion that the State of California is capable of furnishing food for its coming millions, even if large tracts of desert land are not reclaimed at the expense of better land.

Can it then be said that in this State water other than that supplied by the rains is necessary to meet the wants of vegetation sufficient to supply the *natural* wants of man.

Do not nearly all the agricultural lands in this State without artificial aid yield a good and even profitable crop?

Would not any increase in yield be simply a matter of gain or profit to the farmer, and irrigation be measured by such increased profit?

Is not the object and effect of irrigation in this State, except in a few exceptional cases, to increase the fertility of an already fruitful soil?

Is it not a fact that yield of grain per acre in this State is surpassed in very few if any of the other States of the Union?

When all of the foregoing questions can only be answered in the affirmative, can it be said that irrigation is an imperious necessity in California?

Take the wine interests of this State. Is irrigation necessary in the counties where the most of our wine is made, is it not a matter of common history that in Napa County it is necessary to drain the valley land, and are not large sums of money expended in blind ditches and tiling to conduct from the vineyards the surplus supply of water?

In conclusion we respectfully submit that no agricultural or horticultural interest in this State demands as an imperious or imperative necessity or even as a matter of public policy, that this Court should decide in favor of appropriation and against the well-established doctrine of riparian

rights, and on the plea of such necessity or policy work an incalculable injury upon riparian proprietors.

IN CONCLUSION.

This Court is asked to exercise its ingenuity in this case as the Supreme Court of Texas was, in *Davis* vs. *Fleming* (37 Texas, 200), and fix some rule that shall take the place of that established by the Common Law, relating to water rights.

What rule will it adopt?

What rule can it adopt that would be more just and reasonable than that established by the Common Law, or one that would better give the greatest good to the greatest numbers, and would in fewer cases operate unjustly, for any general rule, and it is only a general rule that this Court or even the Legislature can adopt, will in individual cases, undoubtedly, seemingly at least, work an injustice.

When the Supreme Court of Nevada was asked to disregaad the Common Law rule and recognize the rights of appropriation, Chief Justice Lewis, in a few words, shows that no rule can be adopted so just and so reasonable as the Common Law rule, or that in so few cases would work a hardship.

As this opinion of Chief Justice Lewis was concurred in by one of the counsel for defendant in this case, having thus received his endorsement when sitting on the bench and unbiased, his judgment being in no manner affected by the

interest of a client, we can, we think, safely say, that should this Court adopt the views of Chief Justice Lewis that your Honors decision in this case will not only be one following the doctrine approved by Lord Denman, Judge Story, Chancellor Kent, Chief Justice Lewis, but also one that counsel for defendant will not only be satisfied with, but will also cause him to feel highly complimented by the just appreciation your Honors will thus show in following the views endorsed, if not expressed, by him in the leading case on riparian rights on the Pacific Coast.

We, with confidence in the correctness of our views on this question, submit this case, and are satisfied your Honcrs can only view this question as did Chief Justice Lewis in *Vansickle* vs. *Haines*, 7 Nev., 286, as to the relative merits of the common Law doctrine of water rights, and those of prior appropriation. He says :

" *But suppose this decision should necessitate* " *the adoption of the Common Law respecting* " *the manner in which running water may be* " *used by those having the right to it; although* " *it may operate unjustly in some cases, still,* " *as a general rule, none more just and* " *reasonable can be adopted for this State It* " *is a rule which gives the greatest right to* " *the greatest number, authorizing each to* " *make a reasonable use of it, providing he* " *does no injury to the others equally entitled* " *to it himself; while the rule of prior appro-* " *priation here advocated would authorize* " *the first person who might choose to*

"*make use of or divert a stream, to*
"*use or even waste the whole to the*
"*utter ruin of those who might wish it.*
"*The Common Law does not, as seems to be*
"*claimed, deprive all of the right to use, but, on*
"*the contrary, allows all riparian proprietors to*
"*use it in any manner not incompatible with the*
"*rights of others.*

"When it is said that a proprietor has the right
"to have a stream continue through his land, it
"is not intended to be said that he has the right
"to *all* the water, for that would render the
"stream which belongs to all the proprietors of
"no use to any. What is meant is, that no one
"can absolutely divert the whole stream, but must
"use it in such manner as not to injure those be-
"low him. As the right is equal in each owner
"of the land, because naturally each owner can
"equally enjoy it, so one must exercise that right
"in himself without disturbing any other above
"or below his natural advantages."

Van Sickle vs. *Haines*, 7 Nev., 286.

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See Map in end of duplicate brief.

Service accepted by copy, this 28th
day of February A. D. 1884.

Louis F. Haggin

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